BLEED THROUGH POOR COPY

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulation involved	2
Statement	3
1. The statutory and regulatory scheme	4
2. The facts	9
a. No. 76-419 (*Vermont Yankee*)	9
b. No. 76-528 (*Consumers Power*)	17
3. The decisions of the Court of Appeals	26
a. No. 76-419 (*Vermont Yankee*)	26
b. No. 76-528 (*Consumers Power*)	32
Summary of argument	34
Argument	36
I. The rulemaking proceeding was adequate	36
A. The Commission's rulemaking procedures complied with the Administrative Procedure Act	38
B. The court of appeals improperly imposed procedural requirements in addition to those specified by Congress	46
II. The environmental impact statement for Consumer's Midland reactors was adequate	51

Argument—Continued Page

A. The commission had no independent obligation in 1972 to consider whether energy conservation might affect the need for the proposed plant 55

B. Intervenors did not adequately present energy conservation issues 61

III. The ACRS report should not have been returned to the ACRS for supplementation 66

Conclusion 74

CITATIONS

Cases:

Aberdeen and Rockfish R. Co. v. *Students Challenging Regulatory Agency Procedures (SCRAP I)*, 409 U.S. 1207 53

Aberdeen & Rockfish R. Co. v. *Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289 ..... 52, 53

American Airlines, Inc. v. *Civil Aeronautics Board*, 359 F.2d 624 ..... 46, 50

Bi-Metallic Investment Co. v. *State Board of Equalization*, 239 U.S. 441 39

Bowles v. *Willingham*, 321 U.S. 503 39

Bruton v. *United States*, 391 U.S. 123 55

Cady v. *Morton*, 527 F.2d 786 55

California Citizens Band Association v. *United States*, 375 F.2d 43, certiorari denied, 389 U.S. 844 39

Calvert Cliffs' Coordinating Committee, Inc. v. *Atomic Energy Commission*, 449 F.2d 1109 ..... 5, 6, 7, 19, 52, 53, 56

BLEED THROUGH POOR COPY

Cases—Continued Page

Camp v. *Pitts*, 411 U.S. 138 ..... 36, 48
Carolina Environmental Study Group v. *United States*, 510 F.2d 796 8
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 36
Ely v. *Velde*, 451 F.2d 1130 55
Environmental Defense Fund, Inc. v. *Corps of Engineers*, 492 F.2d 1123 55
Environmental Defense Fund, Inc. v. *Froehlke*, 473 F.2d 346 55
Environmental Defense Fund, Inc. v. *Tennessee Valley Authority*, 468 F.2d 1164 52
Ethyl Corp. v. *Environmental Protection Agency*, 541 F.2d 1 36
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134 49
Federal Communications Commission v. *Schreiber*, 381 U.S. 279 44
Federal Power Commission v. *Texaco*, 377 U.S. 33 40
Federal Power Commission v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 ..... 36, 44
Gage v. *Atomic Energy Commission*, 479 F.2d 1214 8
Hart v. *Denver Urban Renewal Authority*, 551 F.2d 1178 55
Home Box Office, Inc. v. *Federal Communications Commission*, C.A. D.C., No. 75-1280, decided March 25, 1977 ..... 38, 46-47
International Harvester Co. v. *Ruckelshaus*, 478 F.2d 615 46

Cases—Continued

	Page
Interstate Commerce Commission v. *Jersey City*, 322 U.S. 503	59
Jicarilla Apache Tribe of Indians v. *Morton*, 471 F.2d 1275	41
Jones v. *Lynn*, 477 F.2d 885	55
Kleppe v. *Sierra Club*, 427 U.S. 390	35, 41, 53, 54
Lathan v. *Brinegar*, 506 F.2d 677	41, 52
Lutwak v. *United States*, 344 U.S. 604	55
National Helium Corp. v. *Morton*, 486 F.2d 995	52
Natural Resources Defense Council, Inc. v. *Morton*, 458 F.2d 827	54, 57
Natural Resources Defense Council, Inc. v. *Tennessee Valley Authority*, 367 F. Supp. 128	55
Natural Resources Defense Council, Inc. v. *United States Nuclear Regulatory Commission*, 539 F.2d 824, certiorari granted on other grounds, March 28, 1977 (No. 76-653)	41
New York v. *Kleppe*, 429 U.S. 1307	54
Northern Indiana Public Service Co. v. *Porter County Chapter of the Izaak Walton League*, 423 U.S. 12	8
O'Donnell v. *Shaffer*, 491 F.2d 59	46
Ogunquit Village Corp. v. *Davis*, C.A. 1, No. 76-1425, decided April 20, 1977	55
Pickus v. *United States Bd. of Parole*, 543 F.2d 240	39, 46
Portland Cement Association v. *Ruckelshaus*, 486 F.2d 375, certiorari denied *sub nom. Portland Cement Corp.* v. *Administrator, Environmental Protection Agency*, 417 U.S. 921	66

BLEED THROUGH POOR COPY

Cases—Continued Page

Potomac Electric Power Company, 8 A.E.C. 79 16
Power Reactor Co. v. *Electricians*, 367 U.S. 396 ..... 5, 43
Public Service Co. of New Hampshire, 5 N.R.C. 503, March 31, 1977 56
Scenic Rivers Association v. *Lynn*, 520 F.2d 240, reversed on other grounds, 426 U.S. 776 41
Schneble v. *Florida*, 405 U.S. 427 55
Siegel v. *Atomic Energy Commission*, 400 F.2d 778 40
Sierra Club v. *Morton*, 510 F.2d 813 55
Swain v. *Brinegar*, 542 F.2d 364 55
Union of Concerned Scientists v. *Atomic Energy Commission*, 499 F.2d 1069 ..... 9, 71
United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 ..... 38, 40, 45
United States v. *Florida East Coast Railway Company*, 410 U.S. 224 ..... 39, 40
United States v. *Interstate Commerce Commission*, 396 U.S. 491 60
United States v. *Zucca*, 351 U.S. 91 43
Wong Yang Sung v. *McGrath*, 339 U.S. 33 ..... 44, 47
Wyoming Outdoor Coordinating Council v. *Butz*, 484 F.2d 1244 55

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.* 2, 38
5 U.S.C. 553 ..... *passim*
5 U.S.C. 553(b) 38

Statutes and regulations—Continued

	Page
5 U.S.C. 553(c)	38, 43
5 U.S.C. 556	40
5 U.S.C. 556(d)	39
Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U.S.C. 2011 *et seq.*	2, 3, 4, 39
42 U.S.C. 2014(e)	4
42 U.S.C. 2014(aa)	4
42 U.S.C. 2021(k)	56
42 U.S.C. 2039	6, 73
42 U.S.C. 2071 *et seq.*	4
42 U.S.C. 2091 *et seq.*	4
42 U.S.C. 2111 *et seq.*	4
42 U.S.C. 2131	4
42 U.S.C. 2133	5
42 U.S.C. 2140(a)	4
42 U.S.C. 2231	40
42 U.S.C. 2232	5
42 U.S.C. 2232(a)	9
42 U.S.C. 2232(b)	6, 33, 68, 69
42 U.S.C. 2235	5
42 U.S.C. 2239	5, 8, 9
42 U.S.C. 2239(a)	18, 39, 69
Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C. (Supp. V) 5801 *et seq.*	3, 4
42 U.S.C. (Supp. V) 5841(f)	67
42 U.S.C. (Supp. V) 5843(b)	67
Federal Trade Commission Improvements Act, 88 Stat. 2193, 15 U.S.C. (Supp. V) 57a	42

BLEED THROUGH POOR COPY

Statutes and regulations—Continued Page

National Environmental Policy Act of 1969, 83 Stat. 852, as amended, 42 U.S.C. 4321 *et seq.* 3, 7, 39
Section 101, 42 U.S.C. 4331 52
Section 102, 42 U.S.C. 4332 52
Section 102(2), 42 U.S.C. 4332(2) 52
Section 102(2)(A), 42 U.S.C. 4332(2)(A) 40, 53
Section 102(2)(B), 42 U.S.C. 4332(2)(B) 53
Section 102(2)(C), 42 U.S.C. 4332(2)(C) 40, 53
Toxic Substances Control Act, Pub. L. 94-469, 90 Stat. 2020-2023 42
71 Stat. 576 68
28 U.S.C. 2342 8
10 C.F.R. Part 2 ..... 7, 9
10 C.F.R. 2.101 5
10 C.F.R. 2.102(b) 6
10 C.F.R. 2.105 9
10 C.F.R. 2.714 8
10 C.F.R. 2.721 8
10 C.F.R. 2.743(g) 7
10 C.F.R. 2.786 8
10 C.F.R. 2.787 8
10 C.F.R. Part 50 ..... 4, 5, 20
10 C.F.R. 50.30(a) 5
10 C.F.R. 50.30(f) 5
10 C.F.R. 50.34(a) 5
10 C.F.R. 50.34(a)(1)-(10) 6
10 C.F.R. 50.34(b) 8
10 C.F.R. 50.35(a) 8
10 C.F.R. 50.57(a) 9

Statutes and regulations—Continued

	Page
10 C.F.R. 50.58	9
10 C.F.R. Part 51	5
10 C.F.R. 51.20(e)	3, 8
10 C.F.R. 51.21	9
10 C.F.R. 51.22-51.26	7
10 C.F.R. 51.23(d)	57
40 C.F.R. 1500.8(a)(4)	4, 9

Miscellaneous:

A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities, Joint Committee Print, 85th Cong., 1st Sess. (1957)	68, 69
CEQ Memorandum for Heads of Agencies (August 2, 1973)	59
Clagett, *Informal Action-Adjudication-Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 Duke L.J. 51	47
Congressional Quarterly, *Continuing Energy Crisis in America* (1975)	58
115 Cong. Rec. 40416 (1969)	53
Davis, *Administrative Law of the Seventies*, Supplementing *Administrative Law Treatise*, Sec. 6.04-1 (1976)	47
"Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle," NUREG-0116 (October 1976)	30-31
Executive Order 11991, 42 Fed. Reg. 26967	61
Federal Energy Administration, *Project Independence* (1974)	58

BLEED THROUGH POOR COPY

Miscellaneous—Continued

	Page
36 Fed. Reg. 1801	20
36 Fed. Reg. 7725	58
38 Fed. Reg. 49	12
38 Fed. Reg. 20550	23, 59
38 Fed. Reg. 21265	23, 59
39 Fed. Reg. 14188	16
41 Fed. Reg. 34707	30
41 Fed. Reg. 45849	30
41 Fed. Reg. 49898	31
42 Fed. Reg. 13803	31
42 Fed. Reg. 26987	32
"Final Generic Environmental Statement on the Use of Recycle Plutonium in Mixed Oxide Fuel in Light Water Cooled Reactors: Health, Safety and Environment," NUREG-0002 (August 1976)	31
Ford Foundation, *A Time to Choose: America's Energy Future* (1974)	58
Foster Associates, Inc., *Energy Prices 1960-1973—A Report to the Energy Policy Project of the Ford Foundation* (1974)	58
H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946)	42
H.R. Rep. No. 93-707, 93d Cong., 1st Sess. (1973)	4
"Public Comments and Task Force Responses Regarding the Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle," NUREG-0216 (March 1977)	30-31
S. Rep. No. 752, 79th Cong., 1st Sess. (1945)	43

Miscellaneous—Continued Page

S. Rep. No. 296, 85th Cong., 1st Sess. (1957) 68, 69, 70
S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969) 53
The Attorney General's Manual on the Administrative Procedure Act (1947) 43
Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375 (1974) 37, 45, 47

BLEED THROUGH POOR COPY

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-419

VERMONT YANKEE NUCLEAR POWER CORPORATION, PETITIONER

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

No. 76-528

CONSUMERS POWER COMPANY, PETITIONER

v.

NELSON AESCHLIMAN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals in No. 76-419 (App. 28) is reported at 547 F. 2d 633. The opinion of the court of appeals in No. 76-528 (App. 89) is reported at 547 F. 2d 622.

JURISDICTION

The judgments of the court of appeals were entered on July 21, 1976. The petition in No. 76-419 was filed on September 21, 1976, and that in No. 76-528 on October 15, 1976. The petitions were granted and the cases consolidated on February 22, 1977. The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether rulemaking proceedings governed by and fully complying with 5 U.S.C. 553 (the applicable provision of the Administrative Procedure Act) were nevertheless defective for failure to ventilate the issues sufficiently.

2. Whether the National Environmental Policy Act requires the reopening of an agency proceeding to assess new information bearing on alleged possible alternatives, where the alleged alternatives were neither obviously central to the agency decision nor clearly identified as issues in the agency hearing.

3. Whether judicial relief is appropriate for the failure of the Commission's licensing board, *sua sponte*, to have returned to its Advisory Committee on Reactor Safeguards for further clarification that Committee's report concerning a proposed nuclear power plant.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, the Atomic Energy Act of 1954, 68 Stat. 919, as amended, 42 U.S.C.

BLEED THROUGH POOR COPY

2011 *et seq.*, the National Environmental Policy Act of 1969, 83 Stat. 852, as amended, 42 U.S.C. 4321 *et seq.*, and 10 C.F.R. 51.20(e) are set forth in Pet. No. 76-419 App. A-159 to A-210, A-258 to A-262.

STATEMENT

These cases involve challenges to the procedures by which the Commission [1] licenses nuclear reactors used for the production of power. The question common to both cases is the adequacy of the rulemaking proceeding that led to the promulgation of a table for use in individual reactor licensing proceedings to evaluate the environmental effects of preparing, transporting, using and ultimately disposing of the nuclear fuel required for the particular reactor Pet. No. 76-419, pp. 13-20; Pet. No. 76-528, pp. 12-16).[2]

---

[1] In January of 1975 the Nuclear Regulatory Commission (NRC) succeeded to the licensing and related regulatory functions of the Atomic Energy Commission (AEC) in accordance with the Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C. (Supp. V) 5801 *et seq.* (Pet. No. 76-419 App. A-211 to A-257). Throughout this brief "Commission" designates either the AEC or the NRC without further explanation, except where the distinction is important and confusion might arise.

[2] The series of steps involved is referred to as the nuclear fuel cycle or, as applied to the present generation of light-water-moderated uranium-fueled reactors, the uranium fuel cycle. It includes the mining and milling of natural uranium, uranium enrichment, the fabrication of fuel elements, the use of the fuel in the nuclear reactor, the processing of spent fuel, the transportation of the fuel to and from the reactor, and the management and disposal of radioactive wastes created at any of the previous stages.

1. The Statutory And Regulatory Scheme

The Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, gave the AEC authority to develop and regulate nuclear power. The Energy Reorganization Act of 1974, 42 U.S.C. (Supp. V) 5801 *et seq.*, transferred the licensing and related regulatory functions of the AEC to the NRC in order "to more effectively address the complicated, demanding tasks of licensing nuclear plants, materials, and activities." H.R. Rep. No. 93-707, 93d Cong., 1st Sess. 4 (1973). The NRC's regulatory authority spans most of the nuclear fuel cycle.[3]

---

[3] The Commission has not asserted regulatory authority over uranium mining. Reprocessing and power plants are brought under the Commission's licensing authority by 42 U.S.C. 2131, which prohibits any person from operating a "production facility" or a "utilization facility" without a license from the Commission. Such facilities are defined by 42 U.S.C. 2014(aa) to include equipment capable of producing or making use of significant quantities of "special nuclear material," defined in turn as plutonium, or uranium enriched in the isotopes 233 or 235. A nuclear power reactor utilizes special nuclear material in a controlled nuclear chain reaction, which produces heat used to generate electricity. See generally 10 C.F.R. Part 50. Enrichment facilities are also production facilities, but since they are operated under contracts with the Energy Research and Development Administration they are exempt from the Commission's licensing authority (42 U.S.C. 2140(a)).

The Commission's regulatory responsibility at other stages of the nuclear fuel cycle is based on its authority over special nuclear material, source material, and by-product material, established respectively by 42 U.S.C. 2071 *et seq.*, 42 U.S.C. 2091 *et seq.*, and 42 U.S.C. 2111 *et seq.* Radioactive waste, for example, is largely "byproduct material," defined by 42 U.S.C. 2014(e) as "any radioactive material (except special nuclear material) * * * yielded in or made radioactive by exposure to

BLEED THROUGH POOR COPY

With specific regard to nuclear power plants, the Atomic Energy Act contemplates a two-stage licensing procedure: such facilities must initially obtain a construction permit, and thereafter an operating license. See generally 42 U.S.C. 2133, 2232, 2235 and 2239; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396.

Under Commission regulations, the utility's application for a power plant construction permit must contain a preliminary safety analysis report, an environmental report, and information required for antitrust review. 10 C.F.R. 2.101, 50.30(f), 50.33a and 50.34(a).[4] The preliminary safety analysis re-

---

radiation incident to the process of producing or utilizing special nuclear material." Regulations specifically pertaining to the management of radioactive waste appear in several different parts of Title 10 of the Code of Federal Regulations.

[4] The text cites the Commission's regulations now in effect. At the time the Consumers Power construction permit hearing opened, the required environmental review was less extensive than now. Compare 10 C.F.R. Part 50, App. D, pp. 246-250 (1971) with 10 C.F.R. Part 51 (1977). After the governing regulations were invalidated in *Calvert Cliffs' Coordinating Committee, Inc.* v. *Atomic Energy Commission*, 449 F. 2d 1109 (C.A. D.C.), the Consumers Power environmental report was supplemented, and an environmental hearing conforming to the amended regulations was held. See *infra*, pp. 19-22.

The construction permit for the Vermont Yankee nuclear plant was issued December 11, 1967, long before the National Environmental Policy Act (NEPA) was passed, but NEPA requirements came into effect before the plant was licensed to operate. Pursuant to the Commission's pre-*Calvert Cliffs'* NEPA regulations, 10 C.F.R. Part 50, App. D (1971), an environmental report by the utility and an environmental impact statement by the Commission's staff were prepared prior

port contains a basic description of the design of the proposed plant, a preliminary evaluation of safety related structures, and other information relevant to the safety review performed by the Commission. 10 C.F.R. 50.34(a)(1)-(10). The utility's environmental report describes its assessment of the impact of the proposed plant and possible alternatives which would alter the impact.

The application is reviewed for consistency with the public health and safety by the Commission's staff and by the Advisory Committee on Reactor Safeguards (ACRS), a group of independent experts required by the Atomic Energy Act to review and report to the Commission on each construction permit application for the purpose of advising the Commission on "the hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards." 42 U.S.C. 2039; see 42 U.S.C. 2232(b). The ACRS report summarizes its review, identifies areas for further study, and recommends whether the license application should be granted. The report is made part of the record of the utility's application, 42 U.S.C. 2232(b), 10 C.F.R. 2.102(b), 50.58, as is the staff's own safety evaluation report regarding the proposed plant. These concurrent ACRS and Commission staff reviews usually take more than a year;

---

to action on the operating license. Hearings on the application for an operating license took place after *Calvert Cliffs'* and, pursuant to the revised regulations, included the environmental considerations described in the text.

BLEED THROUGH POOR COPY

when they are completed, the Commission staff supplements its safety evaluation report to discuss any issues raised by the ACRS.

While these safety reports are being prepared, the Commission staff also undertakes the review processes called for by the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* It reviews the utility's environmental report and prepares a draft environmental impact statement, which is widely circulated for comment. 10 C.F.R. 51.22-51.26. Typically, the draft statement encompasses such matters as the environmental impact of site preparation and plant construction, the impact of plant operation on land and water resources, its radiological impact on man, the need for the plant's power, and alternative sources of power such as fossil fuel plants. After the analysis of any comments received on the draft statement, the staff publishes a final cost-benefit balance for the proposed facility in a final environmental impact statement. 10 C.F.R. 51.26.

While NEPA requires in terms only that this final statement accompany the application through the decision process, since the decision in *Calvert Cliffs' Coordinating Committee, Inc.* v. *Atomic Energy Commission*, 449 F. 2d 1109 (C.A. D.C.), the Commission has considered the environmental impact as well as the health and safety of the proposed facility during the mandatory adjudicatory hearing on the application for a construction permit. 10 C.F.R. 2.743(g); see 10 C.F.R. Part 2, App. A, V(f). The three-member

Atomic Safety and Licensing Board [5] authorizes the issuance of a construction permit only if it concludes that there is reasonable assurance that the proposed facility can be constructed and operated without undue risk to the health and safety of the public, 10 C.F.R. 50.35(a), 42 U.S.C. 2241, and that the environmental cost-benefit balance favors the issuance of a construction permit. The Licensing Board's decision is appealable to an Atomic Safety and Licensing Appeal Board, and thereafter is subject to discretionary review by the Commission itself. 10 C.F.R. 2.714, 2.721, 2.787, 2.786. Final orders are directly appealable to the courts of appeals. 42 U.S.C. 2239; 28 U.S.C. 2342; *Northern Indiana Public Service Co.* v. *Porter County Chapter of the Izaak Walton League*, 423 U.S. 12; *Carolina Environmental Study Group* v. *United States*, 510 F. 2d 796 (C.A. D.C.); *Gage* v. *Atomic Energy Commission*, 479 F. 2d 1214, 1218 (C.A. D.C.).

There is a similar review process at the operating license application stage. The utility again submits a safety report, the Final Safety Analysis Report, which is reviewed and reported on by the staff and by the ACRS, 10 C.F.R. 50.34(b). The environmental review, however, merely updates the environmental review conducted at the construction permit stage, since at that stage both the utility's environmental report and the staff's final environmental impact

[5] The Licensing Board is composed of a lawyer chairman and two members with technical expertise appropriate to the issues.

BLEED THROUGH POOR COPY

statement examined the environmental impacts of the plant's operation as well as its construction, 10 C.F.R. 51.21. Moreover, unlike the mandatory hearing at the construction permit stage, the operating license hearing is held only in contested cases and may be limited to the matters in controversy. See 42 U.S.C. 2239(a); 10 C.F.R. 2.105; 10 C.F.R. Part 2, App. A, V(f). Before authorizing the issuance of an operating license in contested cases, the Licensing Board must find reasonable assurance that the activities authorized by the license can be conducted without endangering the public health and safety, and that issuance of the license will not be inimical to the common defense and security or the health and safety of the public. See 42 U.S.C. 2232(a); 10 C.F.R. 50.57 (a). See generally *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F. 2d 1069 (C.A. D.C.). The Licensing Board's decision at this stage is subject to the same review procedures as its decision on a construction permit application.

2. The Facts

a. *No. 76-419 (Vermont Yankee)*

On December 11, 1967, petitioner, Vermont Yankee Nuclear Power Corporation, was granted a permit by the Atomic Energy Commission to construct a nuclear power plant in Vernon, Vermont. 4 A.E.C. 36 (1967). Respondent Natural Resources Defense Council (NRDC) objected to the issuance of an operating license for the plant, so hearings on Vermont

Yankee's application for an operating license began on August 10, 1971. NRDC appeared in opposition to the issuance of the license. The Licensing Board excluded from consideration in the licensing proceeding, over NRDC's objection, the issue of the environmental effects of fuel reprocessing and disposal of long-lived radioactive wastes. The Licensing Board's rulings were affirmed by the Appeal Board, which reasoned that the appropriate time to consider the environmental impact of reprocessing and waste disposal was during the consideration of permits for the construction and operation of reprocessing or waste disposal facilities (App. 112-129).[6]

Some months thereafter, on November 15, 1972, the Commission gave notice that it would hold a rulemaking proceeding "that would specifically deal with the question of consideration of environmental effects

---

[6] The Appeal Board noted that none of the fuel in the Vermont Yankee reactor would be replaced until after 18 months of operation, when approximately 4 percent of the fuel assemblies would be replaced. Approximately 40 percent would be replaced 12 months after that, and 25 to 30 percent every 12 months thereafter. "There is no way of ascertaining now which of the various reprocessing plants now in existence or to be constructed will from time to time receive some irradiated fuel elements from this plant for reprocessing during its estimated 40-year life. * * * [E]valuation of the environmental effects of the operation of one or more unidentifiable reprocessing plants, employing separation processes which are unidentified and which may or may not now be known or used, during the course of the forty-year life of the plant, is not possible at this time and in this proceeding" (App. 118-120).

BLEED THROUGH POOR COPY

associated with the uranium fuel cycle in the individual cost-benefit analyses for light water cooled nuclear power reactors" (App. 352).

In preparation for this hearing, the Commission's regulatory staff developed a report entitled "Environmental Survey of the Nuclear Fuel Cycle." The Environmental Survey analyzed the operation of a hypothetical light water cooled nuclear reactor of contemporary size, describing the reactor's impact on the environment at each step of the fuel cycle. App. 542, 759. This survey showed the effects to be so small that they would not significantly affect the total environmental costs imposed by an individual nuclear plant.

Two proposed alternatives were set out in the Notice of Proposed Rulemaking (App. 356-357). Under both alternatives the applicant's environmental report and the Commission's impact statements would cover in detail the storage of irradiated fuel on site and the transportation of fuel and waste to and from the reactor. Under one alternative, no quantitative consideration of the environmental costs of other off-site fuel cycle activities would be required, because the Environmental Survey had shown them to be slight. (The effects would, however, be considered in proceedings for the licensing of the fuel cycle facilities themselves.) Under the other alternative, impact values for the off-site fuel cycle environmental costs of licensing a nuclear power reactor would be specified in a table to be employed in each reactor licens-

ing hearing for whatever effect it might have on the overall cost-benefit balance.[7] The Commission invited written comments on the proposed rules and on the Environmental Survey, and announced that an informal rulemaking hearing would begin on February 1, 1973.[8]

The principal controversy before this Court in these petitions relates to the procedures employed in this hearing. The Commission first announced the procedural format in a supplemental notice of rulemaking hearing, dated December 27, 1972 (38 Fed. Reg. 49; App. 361). The procedures provided for written and oral comments, and for questioning by the Hearing Board of the participants. They did not permit discovery[9] or cross-examination by the parties. Following the hearing, the record was to be held open for 30 days to allow for the filing of supplementary written statements. The Hearing Board, without render-

---

[7] The proposed table of impacts, Table S-3 of the Environmental Survey, summarizes quantitatively the maximum annual effect on the environment anticipated to result from each off-site fuel cycle activity associated with the model light-water reactor (App. 358).

[8] Copies of the Environmental Survey were provided to all persons requesting them. The Commission also made available in its Public Document Room, several weeks prior to the hearings, the background studies, hand-written staff calculations, and supporting reference materials for the Environmental Survey.

[9] Nevertheless, when Consolidated National Intervenors requested documents in addition to those previously made available, they were provided. No other parties requested additional information. R. 776-779, 5369-5405. "R." refers to the agency record.

BLEED THROUGH POOR COPY

ing any decision or making any recommendation, would then forward the transcript of the hearing to the Commission, with an identification of contested issues, for the Commission's determination of an appropriate rule.

Written comments were submitted by more than forty individuals and organizations representing federal and state agencies, industry, public utilities, environmental and citizens groups, and private citizens. On January 17, 1973, the Hearing Board held a procedure planning session to schedule the appearance of witnesses and to discuss methods for compiling a meaningful record. No one at that time questioned the adequacy of the legislative-type procedural format for the hearing. R. 5645-5704.[10]

The hearing took place on February 1 and 2, with the participation of the Commission's regulatory staff, the U.S. Environmental Protection Agency, the States of New York and Minnesota, a major manufacturer of reactor equipment, a trade association for the nu-

---

[10] Prior to the hearings, the only suggestion that the Commission should have empowered the Hearing Board to offer more extensive procedures appears to have been made by the Sierra Club. In its comments on the Environmental Survey, received on January 27, 1973, 5 days before the scheduled hearing, the Sierra Club suggested that the proceedings should provide for discovery and cross-examination to afford the "probing review" needed to explore the environmental costs of the fuel cycle "to the full limit of our present intelligence." R. 5793; App. 757-775. These comments did not elaborate or otherwise indicate why the Commission's procedures could not be expected to produce an adequate record for rulemaking.

clear industry, a group of fourteen electric utilities, and Consolidated National Intervenors (CNI) representing 79 groups and individuals including respondent NRDC. Extensive oral testimony was presented by the Commission regulatory staff and by CNI, with shorter presentations by other participants. No evidence was excluded or limited for any reason by the Hearing Board.

Major testimony presented by the regulatory staff included statements by S. H. Smiley, Deputy Director for Fuels and Materials of the Commission's Directorate of Licensing, and by Dr. Frank Pittman, Director of the Commission's Division of Waste Management and Transportation. Mr. Smiley's statement, App. 757-775, described the methodology and conclusion of the Environmental Survey and addressed all steps in the uranium fuel cycle, including reprocessing and waste management. The Hearing Board's questioning of Mr. Smiley, following presentation of his statement, occupies 34 pages in the original transcript. App. 801-827. Dr. Pittman's statement, App. 776-799, elaborated on the high level waste management phase of the fuel cycle. Dr. Pittman described the then current Commission program for construction of a facility for storage of commercial high-level waste in sealed canisters and also described the research and development program for methods of permanent waste disposal, for example, disposal in underground salt beds. The Hearing Board questioned Dr. Pittman more briefly, asking about the safety of methods currently in use for retaining high-level

BLEED THROUGH POOR COPY

waste and the number of waste shipments associated with the annual fuel needs of the model light-water reactor. App. 829-835.

Following the hearing, and in answer to questions raised by the Hearing Board and the participants, the regulatory staff filed a supplementary document that further explained and revised the text and data of the Environmental Survey. R. 6652-6730.[11]

On July 6, 1973, the Hearing Board submitted its report to the Commission. App. 364-378. The Board identified as the principal procedural question CNI's contention that full formal adjudicatory procedures should have been used. App. 369.[12] Among substan-

---

[11] The revised Environmental Survey subsequently was published as WASH-1248, Environmental Survey of the Uranium Fuel Cycle (April, 1974). This document contains Dr. Pittman's statement regarding the environmental effects of high level waste management. Table S-3 in WASH-1248 is identical to the table incorporated in the Commission's fuel cycle rule as promulgated April 17, 1974.

Extensive supplementary material was also filed by CNI, App. 1035-1057, by the Union of Concerned Scientists, App. 1067-1151, by NRDC (independently of the CNI filing), R. 6828-6842, and by the fourteen-member utility group, R. 6843-6867, among many others. See also App. 1024-1034, 1152-1153, 1155-1193.

[12] At the hearing CNI called for cross-examination with full adjudicatory procedures, App. 834, 844, but did not indicate how any specific substantive matters at the hearing might have been better developed by different procedures. In a lengthy "Statement With Respect to Legal Considerations of the Proposed Regulations on the Nuclear Fuel Cycle," App. 1035-1057, filed March 2, 1973, one month after the hearings had closed, CNI again briefly argued the desirability of cross-examination, and furnished a few examples from the hearing

tive issues, the Board identified for the Commission the question of the technical adequacy of the Environmental Survey raised by the comments and questions in the record. App. 372.

On April 16, 1974, the Commission promulgated the fuel cycle rule requiring that the environmental impacts of the uranium fuel cycle as specified in the rule by means of Table S-3 be included in the NEPA analysis for individual nuclear power plants (App. 385-400; 39 Fed. Reg. 14188).[11] As to the procedural issue the Commission stated (App. 389-390; footnote omitted):

> In our view, the procedures adopted provide a more than adequate basis for formulation of the rule we adopted. All parties were fully heard. Nothing offered was excluded. The record does not indicate that any evidentiary material would have been received under different procedures. Nor did the proponent of the strict "adjudicatory" approach make an offer of proof—or even remotely suggest—what substantive matters it would develop under different procedures. In

---

showing how, in CNI's view, adversarial questioning more persistent than the Hearing Board's might have improved the record. App. 1054, 1055. None of these examples was specifically directed to waste management or reprocessing issues.

[11] The numerical values in Table S-3 are not open to challenge in proceedings to license individual nuclear power plants. The Licensing Board must use those values in striking the environmental cost-benefit balance as part of its determination whether a license should be issued. See *Potomac Electric Power Company*, 8 A.E.C. 79 (1974).

BLEED THROUGH POOR COPY

> addition, we note that all documents including the Survey were available to the parties several weeks before the hearing, and the Regulatory staff, though not requested to do so, made available various drafts and handwritten notes. Under all of the circumstances, we conclude that adjudicatory type procedures were not warranted here.

Regarding the adequacy of the record, the Commission reviewed the information presented at the hearing, including the discussion of high level waste management, and concluded that "the Survey and hearing record provide an adequate data base for the regulation adopted." App. 392.

The rule was made prospective only; the impacts quantified in the rule were therefore not included in the NEPA analysis for Vermont Yankee's operating license, which had been issued on February 28, 1973."

b. *No. 76-528 (Consumers Power)*

On January 13, 1969, petitioner Consumers Power Company applied for a permit to construct the Midland plant. The application was initially examined by the Commission's regulatory staff and by the Advisory Committee on Reactor Safeguards. The ACRS issued its report on June 18, 1970, and a supple-

---

" Had the rule been made applicable to the Commission's *Vermont Yankee* proceeding, it is unlikely that the result would have been changed. In the notice promulgating the fuel cycle rule the Commission observed that "the environmental effects of the uranium fuel cycle have been shown to be relatively insignificant" (App. 395).

mental report on September 23, 1970. R. 2611, 2617. Both discussed specific problems and recommended solutions. In addition, the former concluded (R. 2615-2616):

> Other problems related to large water reactors have been identified by the Regulatory Staff and the ACRS and cited in previous ACRS reports. The Committee believes that resolution of these items should apply equally to the Midland Plant Units 1 & 2.
>
> The Committee believes that the above items can be resolved during construction and that, if due consideration is given to these items, the nuclear units proposed for the Midland Plant can be constructed with reasonable assurance that they can be operated without undue risk to the health and safety of the public.

Following completion of the review, the Commission scheduled public hearings before a Licensing Board on the radiological health and safety issues connected with the application. 42 U.S.C. 2239(a). Two groups —Saginaw and Mapleton—intervened in opposition to the application.[1]

---

[1] These two groups are respondents seeking affirmance of the opinion below in No. 76-528.

The Saginaw group includes: the Saginaw Valley Nuclear Study Group, the Citizens Committee for Environmental Protection of Michigan, the Sierra Club, the United Auto Workers International, the West Michigan Environmental Action Council, and the University of Michigan Environmental Law Society.

The Mapleton group includes Nelson Aeschliman and five other residents of the community of Mapleton, Michigan,

BLEED THROUGH POOR COPY

Before the hearing, the Saginaw respondents filed with the Board a number of environmental contentions, R. 2455-2460, directed 337 interrogatories to the ACRS, R. 4661-4725, applied for subpoenas to depose the chairman of the ACRS, R. 8270, and requested discovery of various ACRS documents, R. 3683, 4723. Under the Commission's then existing NEPA regulations, environmental issues could not be raised at the hearing, and the Licensing Board excluded the contentions relating to such issues from consideration. The Licensing Board also denied the various discovery requests directed to the ACRS.[15]

During June and July of 1971, 17 days of hearings were held on numerous radiological health and safety issues. On the last day of the hearings, the decision in *Calvert Cliffs' Coordinating Committee, Inc.* v. *Atomic Energy Commission*, 449 F. 2d 1109 (C.A. D.C.), invalidated the Commission's NEPA regulations; accordingly, the Commission revised its regulations and undertook a full environmental review of the proposed Midland reactor.

---

who filed a separate petition in intervention. The Mapleton intervenors did not raise any objection even arguably relating to energy conservation.

[15] Discovery was denied on the grounds that it would impair the Committee's function, that the Licensing Board would not rely on ACRS conclusions regarding the safety of the reactor, and that the ACRS was not a party to the proceeding (R. 7524-7525, 7615A, 8482-8487).

In accordance with the new regulations,[11] Consumers Power filed a 1400-page environmental report, subsequently amended in response to staff questions. R. 12612, 15697, 16044, 16293. The staff then conducted its own environmental evaluation of the proposed plant. In January 1972, the staff draft environmental statement (R. 16152-16292) and the applicant's environmental report were issued for public comment. Comments were received from eight federal agencies, two local governmental bodies, two business associations, a municipal utility, and four environmental groups. Saginaw submitted 119 environmental contentions both as comments on the draft statement and as its position in the forthcoming hearing (App. 1340).[12] Based on the comments received, the staff extensively revised the draft; it issued a final environmental statement (FES) in

---

[11] 36 Fed. Reg. 18071; see 10 C.F.R. Part 50, App. D (1972).

[12] Three of the 119 contentions mentioned energy conservation (App. 1383-1384); others simply contended that the Board must examine whether the end uses of electricity from the proposed plant would be socially or environmentally proper or improper (*e.g.*, App. 1356-1362, 1378-1380). For the most part, the Licensing Board either noted these contentions for consideration at the hearing or invited Saginaw to brief them as legal issues at the appropriate time. Prehearing Order with respect to Environmental Issues, R. 17336. The Licensing Board's order did exclude from consideration at the hearing those aspects of the environmental effects of the nuclear fuel cycle that were excluded from the *Vermont Yankee* proceeding, and the Appeal Board affirmed (App. 173-183).

BLEED THROUGH POOR COPY

March 1972 (R. 17353-17722)." The Commission then scheduled environmental hearings on the Midland application, which were held for 14 days during May and June of 1972. Saginaw did not appear or otherwise participate in the hearings;" instead, it filed a sharply worded critique of the proceedings, stating that as to environmental issues it had "no conventional findings of fact to set forth," and as to radiological issues, it had not "chosen to search the record and respond to this proceeding by submitting

---

" The FES extensively described the project and thoroughly discussed its environmental impacts. FES at II-1 to VII-3, R. 17376-17499. It also discussed a number of alternatives to the applicant's proposal. They included the need for power (implicitly considering the alternative of not building any plant), alternate sources of power (including a coal-fired steam plant, an oil-fired steam plant, and an oil-fired combined cycle plant), alternate sources of process steam (including oil and coal-fired boilers), alternate sites for the plant, alternate cooling systems (including the proposed pond system, dry cooling towers, and natural and mechanical draft wet cooling towers), as well as several other alternatives. FES at X-1 to XI-11, R. 17503-17515. The discussion compared the environmental impacts and technological advantages and disadvantages of the alternatives with those of the proposed plant. In addition, there was a detailed cost-benefit comparison, in narrative and chart form, of alternate sources of power. The statement concluded that construction permits should issue, provided that the applicant took certain specific steps to protect the environment. FES at iii, R. 17358.

" Saginaw's counsel deemed his presence indispensible to the Commission's then pending rulemaking on emergency core cooling systems. Efforts were made to accommodate the Midland hearings to Saginaw's counsel's schedule, but to no avail. Prehearing conference of April 28, 1972, R. 17855-17888.

citations of matters which we believe were proved or disproved." Saginaw Valley *et al.* Intervenors' Proposed Findings of Fact and Conclusions of Law, R. 22886, 22888, 22892.

In its initial decision, the Licensing Board noted (App. 190 n. 10):

> [T]he failure to propose proper findings and conclusions has greatly complicated the task of the Board and has made it virtually impossible in some instances to know whether particular issues are in fact contested.

The Board nevertheless treated as contested issues "those as to which intervenors introduced affirmative evidence or engaged in substantial cross examination" (App. 191). It expressly recognized its duty to "independently consider the final balance among conflicting environmental factors in the record" (App. 205), and discussed numerous environmental issues, including the need for power and alternative sources of power. It concluded that Consumers' application satisfied the requirements of the Atomic Energy Act and NEPA, and therefore authorized the issuance of construction permits, subject to certain conditions to protect the environment (App. 217-222).[11]

---

[11] On December 18, 1972, a few days after the issuance of the initial decision, the ACRS transmitted to the Chairman of the Commission a list of generic safety concerns, which the ACRS identified as the "other problems" mentioned in its earlier reports on the Midland plant and other individual facilities. R. 24389-24395. The letter listed 25 items as resolved to the satisfaction of the ACRS. The other 22 items remained unresolved, and the ACRS indicated that it would

BLEED THROUGH POOR COPY

The Appeal Board affirmed the Licensing Board's order, subject to Consumers' fulfillment of certain conditions not relevant here. App. 254-321. When the Commission declined review, the Appeal Board's decision became the final decision of the Commission. Saignaw petitioned the court of appeals for review of the Commission decision on August 9, 1973.

At approximately the same time, the Council on Environmental Quality (CEQ) revised its guidelines for the preparation of environmental impact statements (38 Fed. Reg. 20550), mentioning energy conservation for the first time. The revised guidelines applied to final impact statements filed after January 28, 1974 (38 Fed. Reg. 20550, 21265).

On November 6, 1973, more than one year after the record had closed in the Midland case, and while the case was before the court of appeals, the Commission issued an order in an unrelated case, *Niagara Mohawk Power Corp.*, ruling that the *Niagara* Licensing Board could not, consistent with NEPA, bar at the threshold evidence on possible energy conservation alternatives (Pet. No. 76-528, App. 252). Saginaw thereupon filed a motion requesting the Commission to reopen the Midland proceedings and to clarify the Midland decision in light of the *Niagara* ruling.[22]

---

continue to consider them on a case-by-case basis until a generic resolution was reached. R. 24390. Respondents introduced this letter into the record of the proceeding (R. 24385-24388).

[22] The court of appeals delayed briefing on the petition for review in order to allow the Commission to consider this motion.

On January 24, 1974, the Commission carefully examined Saginaw's contentions and refused to reopen the Midland proceedings. App. 324-345. It decided that it was inappropriate to apply the *Niagara* decision retroactively in "the unfolding area of energy conservation" in light of the reliance of the parties on past practice and the consequent burdens that would result from a retroactive application of the new rule (App. 337). The Commission also contrasted the specific contentions made by the *Niagara* intervenors with Saginaw's "diffuse barrage" (App. 334) of 119 contentions containing 17 objections Saginaw identified for the first time in its motion for clarification as relating to energy conservation.[23] In clarification of the *Niagara* order, the Commission asserted (App. 331-332; citations and footnote omitted):

> It would be neither possible nor desirable for us to lay down, at least at this juncture, very precise guidelines governing the kinds of energy conservation issues which should be allowed in licensing proceedings. Widely varying factual circumstances in individual cases, coupled with the inherent generality of the "energy conservation" concept, dictate that such guidelines be developed on a case-by-case basis, or, perhaps,

---

[23] The 17 objections are identified in Saginaw's "Motion to Clarify ALAB-123", dated November 20, 1973 (R. 25121-25134), as contentions 31-34 (App. 1356-1359), 47 (App. 1366-1367), 49 (App. 1367-1368), 72-76 (App. 1378-1380), 81 (App. 1382), 85 (App. 1383), 87-89 (App. 1383-1384), and 92 (App. 1385).

BLEED THROUGH POOR COPY

> through rulemaking. Nevertheless, certain basic considerations can be stated from the present vantage point. Purported energy conservation issues must meet a threshold test—they must relate to some action, methods or developments that would, in their aggregate effect, curtail demand for electricity to a level at which the proposed facility would not be needed. * * * Beyond that, the issue must pertain to an alternative that is "reasonably available." Furthermore, the impact of proposed energy conservation alternatives on demand must be susceptible to a reasonable degree of proof. Largely speculative and remote possibilities need not be weighed against a convincing projection of demand. Here, as with many other issues under the National Environmental Policy Act of 1969, a rule of reason applies.

The Commission noted that, in contrast to the *Niagara* Licensing Board's refusal to consider evidence relating to energy conservation, the Midland Board had invited Saginaw to present evidence concerning or discuss the legal issues relating to substantially all 17 of the contentions it later identified as involving energy conservation,[24] that Saginaw had failed to do so, and that the record supported the Board's ultimate rejection of each contention (App. 334-341).

---

[24] The Commission found that the Board properly refused to consider contentions challenging the social utility of several of the proposed uses of the electricity to be generated (App. 334, 337-339).

The Commission recognized that NEPA "imposes upon [the agency] an affirmative obligation to develop an adequate record upon which to assess the environmental impact of proposed nuclear plants" (App. 343). But it also emphasized that "energy conservation is a novel and evolving concept" (App. 344). Therefore, although after *Niagara* it was to be the responsibility of the applicant, the staff, and the Board to assure that the record on energy conservation issues is adequate whether or not intervenors raise those issues, the *Niagara* rule would not be applied retroactively. At the time of the Midland hearing, it was proper to require the intervenors to formulate their suggestions with some specificity, and to indicate how the suggested alternatives would affect the cost-benefit analysis. The Commission required, however, only that the intervenors' suggestions be "sufficient to require reasonable minds to inquire further" (*id.* at n. 27). Since Saginaw "fell far short" of making even this showing, there was no need to reopen the hearing for further review of its contentions (App. 344).

3. The Decisions of the Court of Appeals

a. *No. 76-419 (Vermont Yankee)*

Separate petitions for review were filed by respondents challenging the granting of the Vermont Yankee operating license without consideration of the environmental effects of the entire nuclear fuel cycle, and the adequacy of the rulemaking proceeding underly-

BLEED THROUGH POOR COPY

ing the fuel cycle regulation. The court of appeals consolidated the cases for argument and held that the Commission had improperly issued the Vermont Yankee operating license without evaluating the environmental effects of its entire fuel cycle, either in that case or in a valid rule. The court recognized that under NEPA the agency was free to consider these environmental effects either in individual licensing proceedings or in the course of generic rulemaking (App. 39-40 n. 17). Since the Commission had elected to proceed by rulemaking, the court remanded the order granting the Vermont Yankee operating license "to await the outcome of further proceedings in the rulemaking" (App. 40).[25]

In considering the adequacy of the rulemaking proceeding, the court noted that the primary argument advanced by the parties seeking review was "that the decision to preclude 'discovery or cross-examination' denied them a meaningful opportunity to participate in the proceedings as guaranteed by due process"

---

[25] Petitioner Vermont Yankee intervened in the proceeding involving the challenge to the issuance of its license (App. 1), but not in the proceeding challenging the rulemaking (App. 6-7). The certiorari petition filed by Baltimore Gas and Electric, *et al.*, intervenors in the latter proceeding, is currently pending before this Court (No. 76-548), and they are participating as respondents in this case. Since the court of appeals consolidated the cases and remanded the order granting Vermont Yankee's license to await further proceedings in the rulemaking proceedings, we submit that the validity of the rulemaking proceedings is properly before this Court in No. 76-419 as it is in No. 76-528, where the decision also turned in part on the validity of the rulemaking procedures.

(App. 43). In contrast, the government "contends that the procedures here were more than adequate. Thus, we are called upon to decide whether the procedures provided by the agency were sufficient to ventilate the issues" (App. 44).

After reviewing the state of the record on waste disposal,[26] the majority concluded that while it did not dispute the conclusions of the Commission's principal witness, Dr. Pittman, "[w]e may not uphold them, however, lacking a thorough explanation and a meaningful opportunity to challenge the judgments underlying them. Our duty is to insure that the reasoning on which such judgments depend, and the data supporting them, are spread out in detail on the public record" (App. 61). The majority did not explicitly designate the procedures necessary in its view to insure preparation of such a detailed record. Rather, it simply noted (App. 67):

> Many procedural devices for creating a genuine dialogue on these issues were available to the agency—including informal conferences between intervenors and staff, document discovery, interrogatories, technical advisory committees comprised of outside experts with differing perspectives, limited cross-examination, funding indo-

[26] Although the court found the fuel cycle rule inadequate with regard to both waste disposal and reprocessing, the court's opinion focused almost entirely on waste disposal, and in particular on Dr. Pittman's statement. See *supra*, pp. 14-15. The court did not offer any explanation for its conclusion that the rulemaking record on fuel reprocessing was inadequate.

BLEED THROUGH POOR COPY

> pendent research by intervenors, detailed annotation of technical reports, surveys of existing literature, memoranda explaining methodology. We do not presume to intrude on the agency's province by dictating to it which, if any, of these devices it must adopt to flesh out the record. It may be that no combination of the procedures mentioned above will prove adequate, and the agency will be required to develop new procedures to accomplish the innovative task of implementing NEPA through rulemaking. On the other hand, the procedures the agency adopted in this case, if administered in a more sensitive, deliberate manner, might suffice. * * *

Judge Tamm, concurring in the result, agreed with the majority that NEPA required consideration of the environmental impact of radioactive wastes prior to approval of an operating license for a nuclear power plant. Further, he was of the view that the record did not clearly show whether the Commission had properly concluded that the impact of those wastes was negligible, or had uncritically accepted the testimony of its staff witness. However, in Judge Tamm's view (App. 83-84):

> [T]he majority's insistence upon increased adversariness and procedural rigidity, uneasily combined with its non-direction toward any specific procedures, continues a distressing trend toward over-formalization of the administrative decisionmaking process which ultimately will impair its utility.
>
> * * * * *

> The appropriate remedy at this point is not to impose ad hoc procedural requirements in an attempt to raise the level of petitioners' participation, already adequate under section 553, but to remand for an explanation of the basis of Dr. Pittman's statements and of the staff's numerical conclusions * * *.

Following the court of appeals' decision, the Commission announced that it interpreted the court of appeals' opinion as requiring a suspension of many of its power reactor licensing activities pending an adequate replacement for the invalidated portion of the rule. The Commission also directed the preparation on an expedited basis of a revised environmental survey to supplement the existing record on the environmental effects of waste management and fuel reprocessing, and, if warranted, to serve as the basis for an interim fuel cycle rule to be promulgated by notice and comment procedures (41 Fed. Reg. 34707). Two months later, the Commission released the revised survey for public comment and gave notice that, pending the adoption of a final rule, it proposed to use a table of environmental impacts taken from the revised survey as a substitute for the values in Table S-3 of the original fuel cycle rule (Pet. No. 76-419, Supplemental App. SA-5; 41 Fed. Reg. 45849).[11]

---

[11] We are lodging a copy of the revised survey and subsequent analysis of public comments with the Clerk of this Court. "Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle," NUREG-0116 (October 1976); "Public Comments and Task Force Responses Regarding the Environmental Survey of the Reprocessing and Waste Management Portions of the

BLEED THROUGH POOR COPY

On October 8, 1976, the court of appeals stayed its mandate. The Commission thereupon issued a supplement to its announcement suspending licensing; taking account of the stay of mandate and the information in the revised evironmental survey, the Commission provided for a conditional resumption of the licensing of nuclear plants (Pet. No. 76-419, Supplemental App. SA-20; 41 Fed. Reg. 49898).

On March 14, 1977, after receipt and analysis of public comments on the revised survey, the Commission promulgated an interim fuel cycle rule. 42 Fed. Reg. 13803.[14] The Commission found that the values in the revised Table S-3 incorporated in the interim rule are not sufficiently different from the values in the original Table S-3 to warrant reopening proceedings to reconsider the cost-benefit balance for previously licensed reactors.[15]

On May 26, 1977, the Commission gave notice that it proposed to adopt the interim rule as the final rule, and announced that a legislative-type hearing, with somewhat more elaborate procedures than those orig-

---

LWR Fuel Cycle," NUREG-0216 (March 1977). The survey drew on data and analysis in more than 175 reports and papers in the public literature, as well as waste generation and reprocessing information in the Commission's recently issued report, "Final Generic Environmental Statement on the Use of Recycle Plutonium in Mixed Oxide Fuel in Light Water Cooled Reactors: Health, Safety and Environment," NUREG-0002 (August 1976).

[14] This rule has been challenged in *Natural Resources Defense Council, Inc.* v. *Nuclear Regulatory Commission*, C.A. D.C., No. 77-1448, filed May 13, 1977.

[15] The interim rule will be effective only for eighteen months, pending completion of final rulemaking proceedings.

inally utilized, was to begin on a schedule set by its Hearing Board (42 Fed. Reg. 26987)."

b. *No. 76-528 (Consumers Power)*

The same day the court of appeals decided *Vermont Yankee*, it also rendered its decision in *Aeschliman* v. *Nuclear Regulatory Commission*, App. 89. It noted that *Vermont Yankee* controlled the fuel cycle issues in this case, and required a remand for reconsideration of the environmental impact of the nuclear fuel cycle of the Midland reactors (App. 109)."

With regard to energy conservation, the court found the Commission's "threshold test" inconsistent with the basic mandate of NEPA that agencies must take the initiative in considering environmental issues. It concluded that the test improperly placed on intervenors the entire burden of compiling the information necessary to determine whether the alternative presented was promising enough to merit detailed consideration in the environmental impact statement, and "essentially require[d] intervenors to prove an alternative satisfie[d] the 'rule of reason' before the Commission [would] investigate it" (App.

---

[10] The Commission has invited the participants in the proceeding to suggest questions and follow-up questions for the Board to ask witnesses at the re-opened hearing, and expressed its expectation that this procedure will be used in a thorough and probing manner.

[11] The Midland construction permit was issued before the effective date of the fuel cycle rule; in *Vermont Yankee*, the court rejected the Commission's decision not to apply the fuel cycle rule retroactively (App. 39-40 n. 17).

BLEED THROUGH POOR COPY

100). The court found that Saginaw's contentions were sufficient to require further Commission consideration of energy conservation because they "identified in a general way the measures [Saginaw] believed merited consideration" (App. 102)[11] and because energy conservation "was clearly a 'colorable' alternative" (*ibid.*).

Turning to intervenors' objections to the ACRS report, the court of appeals analyzed the legislative history of the statutory provision requiring that such report be made public (42 U.S.C. 2232(b)), and concluded that Congress intended the report both to advise the Commission and to inform the public (App. 106-108). While the reference in the ACRS report on the Midland reactors to other problems identified in previous reports may have sufficiently fulfilled the first purpose, the court concluded, it was inadequate for the second (App. 107-108). The court agreed with the Commission that intervenors were not entitled to discovery from individual ACRS members, since such inquiries would compromise the essential collegial and advisory character of that body (App. 106); but the court held that "[o]n remand, the ACRS report should be returned to the ACRS for clarification" (App. 109), although such a remedy had neither been requested by intervenors nor established in Commission practice.

---

[11] The court found that it "need not decide what the result would be if energy conservation had not been brought to the Licensing Board's attention" (App. 94 n. 6).

SUMMARY OF ARGUMENT

Although the opinion below in No. 76-419 is not entirely clear, we assume for purposes of this brief that the court decided that the agency proceeding that led to the Commission's fuel cycle rule was procedurally inadequate. But that proceeding, which was subject to the informal rulemaking requirements of the Administrative Procedure Act (APA), fully complied with those requirements: it provided interested persons with notice, an opportunity to participate in the rulemaking, and a statement of the basis of the rule adopted, 5 U.S.C. 553. No more was required. Neither the legislative history of the APA nor this Court's decisions support the judicial imposition of additional procedural requirements on informal agency rulemaking. No significant issues in the interpretation of the National Environmental Policy Act are here involved.

Moreover, the determination, long after the conclusion of the rulemaking proceedings, that additional procedures should have been used, although no such procedures are required by the Constitution, any statute, or even any clearly articulated standards of administrative law, tends to obstruct the functioning of the rulemaking process. In order to avoid possible invalidation of rules that may be central to the regulatory process, agencies would be encouraged to utilize full adjudicatory procedures for the adoption of rules, whatever the cost in terms of efficiency.

Similarly, the court of appeals' decision in No. 76-528 imposes unwarranted burdens on the agency in the preparation of environmental impact statements.

BLEED THROUGH POOR COPY

Instead of simply insuring that the agency "has taken a 'hard look' at environmental consequences," *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410, the court below required the agency to undertake an investigation of every "colorable alternative" raised by the intervenors and to explain in the impact statement the reason for the rejection of each such alternative (App. 100-101). In determining that the possibility of effective conservation of energy was a "colorable alternative" to the construction of the Midland facility, the court of appeals viewed the 1972 licensing proceeding from the perspective of 1976, after the Arab oil embargo and energy shortages brought the energy crisis to national attention. Petitioners' vague and unfocused comments on the draft environmental impact statement were insufficient in 1972 to direct the Commission's attention to this novel issue, which was peripheral to the questions of public health and safety with which the licensing proceeding was chiefly concerned.

Finally, the conclusion of the court of appeals in No. 76-528 that the Licensing Board should, *sua sponte*, have returned the report on the Midland facility of the Commission's Advisory Committee on Reactor Safeguards to the Committee for clarification, misconceives the function of the Committee and threatens to interfere with the Committee's important function of advising the Commission on highly technical matters relating to the safety of reactors. In any event, the record demonstrates that any possible ambiguity in the original report was subsequently resolved, and thus there was no need to return the report to the Committee for clarification.

ARGUMENT

I. THE RULEMAKING PROCEEDING WAS ADEQUATE

It is open to dispute whether the decision of the court of appeals in *Vermont Yankee* is based on the conclusion that the Commission's rulemaking *procedures* were inadequate, or whether it simply concluded that the *record* upon which the Commission relied in promulgating its rule was inadequate. Compare App. 44, with App. 49-50 and App. 65-69; and compare App. 72-77 (separate statement of Chief Judge Bazelon) with App. 78-86 (separate statement of Judge Tamm, concurring in the result).[11]

If this Court were to read *Vermont Yankee* as holding only that the record on which the agency acted in promulgating its rule was inadequate to support its finding quantifying the environmental effect of radioactive waste disposal and reprocessing, no significant question for review by this Court would be presented.[12] Such a holding would have no serious

---

[11] The separate statements of Judges Bazelon and Tamm make it clear that Chief Judge Bazelon takes the former position and Judge Tamm the latter.

[12] So interpreted, the opinion, even if erroneous, does not overstep the established bounds for judicial review of agency action. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331; *Camp* v. *Pitts*, 411 U.S. 138, 142; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402. Even the presence of highly technical and specialized material in the record does not relieve the reviewing court of its obligation to adjudicate a challenge to the adequacy of the record. *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F. 2d 1, 35 (C.A. D.C.).

BLEED THROUGH POOR COPY

adverse effect on agency functions. Although the Commission does not concede that the record before the court of appeals in *Vermont Yankee* was in any way inadequate,[35] much additional information has since been developed in the revised environmental survey, so that the factual setting now is significantly altered from that before the court of appeals.[36]

If, on the other hand, the court below held that the Commission's rulemaking proceeding was procedurally defective, the decision conflicts sharply with both the Administrative Procedure Act and NEPA, and threatens to inhibit significantly agency efforts to develop flexible, expeditious procedures appropriate to the particular rulemaking involved. See Wright, *The Courts And The Rulemaking Process: The Limits Of Judicial Review*, 59 Cornell L. Rev. 375, 387-388 (1974). Since this Court's grant of certiorari in this case without limitation may be interpreted as indicating that the decision may be so interpreted,[37] the

---

[35] Indeed, on the reprocessing issue, the court of appeals completely failed to explain why it considered the record insufficient.

[36] The Commission intends to complete the rulemaking proceedings currently in process even if petitioners prevail in this case.

[37] The government's brief on the petitions for certiorari (pp. 5-10) expressed the differing views of the Commission and the United States on this matter. In opposing certiorari, respondents Aeschliman *et al.*, Natural Resources Defense Council, and Consolidated National Intervenors explicitly stated their view that the decision involved only a determination that the record developed by the agency was substantively inadequate. Respondents' Brief in Opposition in No.

remainder of the discussion herein will be directed toward that interpretation.

A. The Commission's Rulemaking Procedures Complied With The Administrative Procedure Act.

The Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, defines two types of rulemaking. One, described in 5 U.S.C. 553, involves three steps: first, an agency must give adequate and effective notice of the proposed rule (5 U.S.C. 553(b)); second, it must give interested persons an opportunity to participate in the rulemaking "through submission of written data, views, or arguments with or without opportunity for oral presentation" (5 U.S.C. 553(c)); and third, the agency must incorporate in the rules adopted a "concise general statement" of the basis and purpose for the rule (*ibid.*). See *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758; *Home Box Office, Inc.* v. *Federal Communications Commission*, C.A. D.C., No. 75-1280, decided March 25, 1977, slip op. 49-52. The second type of rulemaking, necessary "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing" (5 U.S.C. 553(c); see 5 U.S.C. 559), involves proceedings more closely analogous to a trial; in such a hearing a party is entitled

---

76-419, pp. 2-5, 9-11; Respondents' Brief in Opposition in No. 76-528, pp. 52-53. See also Respondents' Brief in Opposition in No. 76-548, pp. 13-20.

BLEED THROUGH POOR COPY

to "conduct such cross-examination as may be required for a full and true disclosure of the facts" (5 U.S.C. 556(d)).

The rulemaking proceeding provided here complies with Section 553 (App. 79-80, Tamm, J., concurring; see also App. 42-44, 67 n. 59), and an adjudicatory type hearing was not mandated, since neither the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, nor the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, nor any other statute requires rules of this type to be made on the record after opportunity for a hearing.[35] Although Section 189(a) of the Atomic Energy Act of 1954 (42 U.S.C. 2239(a)) requires that the Commission grant "a hearing" on the request of any person potentially affected by rulemaking dealing with the activities of licensees, it is settled that such statutory language means only that a notice and comment hear-

---

[35] Nor does the Constitution. Respondents evidently claimed below that the Commission's rulemaking procedures denied them due process (App. 43). But the decision below did not rest on constitutional grounds (see, *e.g.*, App. 45, 48, 69, 78 (concurring opinion)), and respondents have evidently abandoned these claims in this Court (see briefs in opposition to petitions for certiorari, *supra*, note 37.) In any event, it is well settled that the Constitution does not require more elaborate procedures than those provided here. See *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 244-245; *Bowles* v. *Willingham*, 321 U.S. 503; *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441; *Pickus* v. *United States Bd. of Parole*, 543 F. 2d 240, 244 (C.A. D.C.); *California Citizens Band Association* v. *United States*, 375 F. 2d 43, 50 (C.A. 9), certiorari denied, 389 U.S. 844.

ing conforming to Section 553 is necessary, and a full adjudicatory hearing pursuant to Section 556 is not required. *Siegel* v. *Atomic Energy Commission*, 400 F. 2d 778, 785-786 (C.A. D.C.); *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757; *United States* v. *Florida East Coast Railway Company*, 410 U.S. 224, 237, 238, 241; *Federal Power Commission* v. *Texaco*, 377 U.S. 33, 44-45. See 42 U.S.C. 2231; 5 U.S.C. 559.

Nor did NEPA require the use in the Commission's rulemaking proceeding of procedures more elaborate than those indicated by Section 553. NEPA directs federal agencies to (42 U.S.C. 4332(2)(A)):

> utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment.

The statute nowhere suggests that such an approach requires that all agency rules even remotely affecting the environment must be made on the record after an opportunity for a hearing. Although an environmental impact statement must be included in every recommendation or report on "major Federal actions significantly affecting the quality of the human environment" (42 U.S.C. 4332(2)(C)), the statute does not define any hearing procedures to be followed in developing such statements or otherwise purport

BLEED THROUGH POOR COPY

to revise normal agency rulemaking procedures.[39] In any event, as the court of appeals recognized, the Commission's rulemaking proceeding that led to the adoption of Table S-3 was not "a 'major Federal action' requiring an environmental impact statement" (App. 66 n. 58). *A fortiori*, there was no necessity under NEPA to conduct an adjudicatory type hearing.

The legislative history of the APA and this Court's decisions establish that Section 553 reflects a balancing of the need for essential procedural safeguards against the need to permit agencies maximum flexibility in dealing with their particular responsibilities. Accordingly, once it is established that a rulemaking proceeding governed by Section 553 complies with that Section, the courts are not free to require the agency to provide more elaborate procedures. In such a case, Congress has left to agency discretion the decision whether the procedures required by Section 553 are sufficient for the particular type of hearing, or, if not, precisely what additional procedures will best assist the agency in considering the proposed rule.[40]

---

[39] See *Natural Resources Defense Council, Inc.* v. *United States Nuclear Regulatory Commission*, 539 F. 2d 824, 838 (C.A. 2), certiorari granted on other grounds, March 28, 1977 (No. 76-653); *Scenic Rivers Association* v. *Lynn*, 520 F. 2d 240, 246 (C.A. 10), reversed on other grounds, 426 U.S. 776; *Lathan* v. *Brinegar*, 506 F. 2d 677, 689 (C.A. 9); *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F. 2d 1275, 1284-1287 (C.A. 9); cf. *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406.

[40] Congress has recently demonstrated that when it does not intend such decisions to be left to agency discretion, it will specifically require the use of "hybrid" procedures in in-

The legislative history of the Administrative Procedure Act reflects Congress' concern to devise a uniform code of procedures for agency action that would satisfy basic considerations of fairness. The House Report noted (H.R. Rep. No. 1980, 79th Cong., 2d Sess. 9, 16-17 (1946)):

> [U]niformity has been found possible and desirable for all classes of both equity and law actions in the courts * * *. It would seem to require no argument to demonstrate that the administrative agencies, exercising but a fraction of the judicial power[,] may likewise operate under uniform rules of practice and procedure and that they may be required to remain within the terms of the law as to the exercise of both quasi-legislative and quasi-judicial power.
>
> * * * * *
>
> The bill is an outline of minimum essential rights and procedures. * * * It affords private parties a means of knowing what their rights are and how they may protect them * * *.
>
> * * * [The bill states] the essentials of the several forms of administrative proceedings * * *.

Congress was equally clear in its intent that, absent other statutory direction, agency rulemaking

---

formal rulemaking. The Federal Trade Commission Improvements Act, 88 Stat. 2193, 15 U.S.C. (Supp. V) 57a, introduced in 1975 the first statutory requirements for oral hearings, with certain limited rights of cross examination, for FTC informal rulemaking otherwise governed by 5 U.S.C. 553. In 1976, the Toxic Substances Control Act, Pub. L. 94-469, 90 Stat. 2020-2023, introduced similar procedures into rulemaking to be conducted by the Administrator of the Environmental Protection Agency.

BLEED THROUGH POOR COPY

need only provide the procedural protections of notice and comment as required by Section 553, unless the agency itself determines that additional procedures should be offered. Thus the Senate Report explains Section 4(b) (now 5 U.S.C. 553(c)) as follows (S. Rep. No. 752, 79th Cong., 1st Sess. 14-15 (1945)):

> This subsection states * * * the minimum requirements of public rule making procedure short of statutory hearing. Under it agencies might in addition confer with industry advisory committees, consult organizations, hold informal "hearings," and the like. Considerations of practicality, necessity, and public interest * * * will naturally govern the agency's determination of the extent to which public proceedings should go. Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures.[41]

This repeated reference to "minimum procedures" and "minimum requirements" indicates that Congress intended that such procedures afford all the protection that an agency may be compelled to offer private parties as of right absent other congressional or constitutional requirements. See 5 U.S.C. 559.

---

[41] Accord, *The Attorney General's Manual on the Administrative Procedure Act* 31, 35 (1947), a contemporaneous interpretation, persuasive because of the role of the Department of Justice in drafting and administering the statute. See *United States* v. *Zucca*, 351 U.S. 91, 96; *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408.

This Court's first major decision interpreting the Administrative Procedure Act reflected this understanding that the Act was intended to specify minimum procedures of administrative fairness uniform to federal agencies. After reviewing the history of the development of the APA in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 36-41, the Court concluded (*id.* at 40):

> The Act thus represents a long period of study and strife; it settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.

Having thus settled on the APA as a "formula" to reconcile agency needs with other public concerns, Congress would not have intended the balance to be struck again each time an agency action came under review.

This Court's subsequent decisions have warned against judicial imposition of additional procedural restraints on agency action. See, *e.g.*, *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333, and *Federal Communications Commission* v. *Schreiber*, 381 U.S. 279, which recognized (*id.* at 290; citation and footnote omitted):

> the established principle that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." * * * This principle, which has been upheld in a variety of applica-

BLEED THROUGH POOR COPY

> tions, is an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.

See, also, *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758.

Even if the statutory language, legislative history and judicial interpretation of Section 553 were less conclusive, there would be persuasive policy reasons for the exercise of judicial restraint in imposing additional procedural requirements on agency rulemaking. See Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375, 387-388 (1974):

> If reviewing courts ignored the guidance of section 553 and instead operated under a vague injunction to find those procedures "best" suited to *each* agency action presented, judicial review of rulemaking would become totally unpredictable.
>
> The administrative response would, however, be completely predictable. Fearing reversal of his substantive initiatives, each administrator would clothe his agency's actions in the full wardrobe of adjudicatory procedure. By demanding procedural refinements on an ad hoc basis, reviewing courts would inadvertently induce agencies to adopt maximum procedures in all

cases. Seeking administrative variety, we would obtain administrative paralysis. The inherent virtues of rulemaking—expedition, flexibility to experiment, a sensible balance between expertise and broad public participation—would be forfeited. Like adjudicatory regulation today, rulemaking would become a lawyer's game.

B. The Court Of Appeals Improperly Imposed Procedural Requirements In Addition To Those Specified By Congress.

As we have shown, Section 553 leaves to agency discretion the determination whether additional procedures, not required by statute, will be utilized in informal rulemaking. A line of cases in the District of Columbia Circuit has, however, required the use of "hybrid rulemaking procedures"—*i.e.*, procedures in excess of those required by Section 553—in certain circumstances." The court of appeals has explained these requirements as "a necessary adjunct to meaningful judicial review of highly technical issues." *Pickus* v. *United States Bd. of Parole*, 543 F. 2d 240, 246 (C.A. D.C.); accord, *Home Box Office, Inc.*

" See, *e.g.*, *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F. 2d 624, 632 (C.A. D.C.), imposing "procedural requirements deemed inherent in the very concept of fair hearing for certain classes of cases, even though no such requirements had been specified by Congress"; *International Harvester Co.* v. *Ruckelshaus*, 478 F. 2d 615, 631 (C.A. D.C.), identifying "particular cases of need [for additional procedures], on critical points where the general procedure proved inadequate to probe "soft" and sensitive subjects and witnesses"; and *O'Donnell* v. *Shaffer*, 491 F. 2d 59, 62 (C.A. D.C.), requiring a "framework [for principled decision making] that is appropriate for the issue at hand."

BLEED THROUGH POOR COPY

v. *Federal Communications Commission*, *supra*, slip op. 51, and cases there cited. Congress, however, has not empowered the courts to alter the balance it struck in the APA on the basis of vague formulas intended to serve judicial convenience; there is no source of law in a non-Constitutional case such as this one that authorizes the courts to overlay the congressional scheme with more elaborate procedural requirements.

Even if it is assumed *arguendo* that the courts may, in extraordinary circumstances, require the use of additional procedures,[11] no such circumstances existed here. Extraordinary circumstances might encompass those no doubt rare instances where the Constitution commands more procedural rights than 5 U.S.C. 553 offers (cf. *Wong Yang Sung* v. *McGrath*, *supra*, 339 U.S. at 49-51), as well as unjustified departures from settled agency practice, such as an agency's refusal to employ for a particular rulemaking more extensive procedures ~~than~~ that the agency has routinely afforded. Here, the Commission's quantification, by rule, of environmental impacts raises no colorable due process claim,[12] and its manner of proceeding was consistent with its previous practice.

---

[11] Davis, *Administrative Law of the Seventies*, Supplementing *Administrative Law Treatise*, Sec. 6.04-1 (1976); cf. Clagett, *Informal Action—Adjudication—Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 Duke L.J. 51, 78. But see Wright, *supra*, 59 Cornell L. Rev. at 385.

[12] See note 38, *supra*.

The court of appeals in *Vermont Yankee* recognized that "[a]bsent extraordinary circumstances, it is not proper for a reviewing court to prescribe the procedural format which an agency must use to explore a given set of issues" (App. 45). The court, nonetheless, set aside the agency rule because it found the procedural format adopted insufficient, without specifying why the circumstances of this rulemaking are extraordinary, or giving any guidance that would assist agencies contemplating rulemaking in identifying similar extraordinary circumstances.

The adverse effects on agency rulemaking of this lack of guidance are exacerbated by the fact that the court of appeals assessed the agency's selection of procedures from the hindsight vantage point of the completed record, rather than from the agency's perspective when it chose the rulemaking procedures. This Court observed in *Camp* v. *Pitts*, 411 U.S. 138, 142, that in review for abuse of discretion "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." As applied to review of agency discretion in choice of rulemaking procedures, the relevant "record in existence" is the information before the agency at the time it makes its choice, including its past experience with similar proceedings. Unless the reviewing court finds that the agency had no reasonable basis for believing the procedures selected could develop an adequate record, the

BLEED THROUGH POOR COPY

selection of those procedures cannot be said to have constituted an abuse of agency discretion."

The court of appeals in effect recognized that the Commission did not abuse its discretion in selecting its fuel cycle rulemaking procedures by remarking that "the procedures the agency adopted in this case, if administered in a more sensitive, deliberate manner, might suffice." App. 67. But the court also applied a retrospective test, one where "[o]f necessity, assessing agency procedures requires that the reviewing court immerse itself in the record." App. 47. "What a reviewing court can do," the court's opinion states, "is scrutinize the record as a whole to insure that genuine opportunities to participate in a meaningful way were provided * * *." App. 46. The court of

---

[11] Especially where, as in this case, the rulemaking hearing is conducted by a hearing board to which the Commission has delegated the function of developing the oral part of the record, rather than by the Commission itself, the rationality of the Commission's choice of procedures, if it is open to review at all, must be tested in terms of what was in prospect, rather than what later turned out. The realities of the agency rulemaking process are such that a denial of additional procedures cannot be fairly reviewed by the same approach a court would take, for example, in reviewing a lower court's on-the-spot decision not to allow cross-examination on a particular point. "[T]o assimilate the relation of * * * administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope * * * of the judicial process." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 144.

appeals thus undertook to evaluate the Commission's choice of procedures on the basis of the record they in fact produced, rather than from the standpoint of the Commission's rationality in adopting them *ab initio*. The reasonableness of the Commission's choice of procedures was thus determined by the court from a perspective not available to the Commission when its choice was made." If that method of judicial review were to prevail, the only way to protect the agencies from the serious interference with their effective functioning that would result from invalidation of their adopted rules would be to require that all rulemaking proceedings be conducted with full adjudicatory procedures, whatever the cost in efficiency and effectiveness in the carrying out of agency programs in furtherance of the public interest.

In short, the *ad hoc* judicial imposition of additional procedural requirements, based neither on the Constitution, on any statute, nor even on any clearly articulated standards of administrative law, would threaten to obstruct the functioning of the rulemaking process and to nullify much of its advantage over

---

" The additional procedures required by the court were not even suggested to the Commission until five days before the hearing was to commence (note 10, *supra*). Even after the hearings, when the intervenors asserted specific flaws in the record to the Commission before its decision, none of the examples cited as demonstrating the need for cross examination related to waste management (note 12, *supra*). The court has thus set aside an agency rule for failure of the agency to conform to procedures neither required by Congress nor sought with reasonable and timely particularity by the parties challenging the proposed rule. See *American Airlines, Inc.* v. *Civil Aeronautics Board*, 359 F. 2d 624, 632-633 (C.A. D.C.).

BLEED THROUGH POOR COPY

case-by-case adjudication as the instrument for efficient development of agency policy. The flexibility which Congress intended agencies to have in the conduct of informal rulemaking would be severely constricted, as the agency would be left to guess which choice of procedures will satisfy a reviewing court years hence, under the risk that a mistaken guess will result in the eventual setting aside of rules that may be central to its regulatory program.

II. THE ENVIRONMENTAL IMPACT STATEMENT FOR CONSUMER'S MIDLAND REACTORS WAS ADEQUATE.

The Commission completed the preparation of its environmental impact statement for Consumers' Midland facility in 1972. The procedures by which it was prepared and considered included submission of the draft for public comment and the conduct of a full adjudicatory hearing in addition to the required written comment process. The statement itself, which treated major issues in substantial depth, fully complied with existing federal guidelines concerning issues to be treated (*infra*, pp. 58-59), and attached the 119 comments respondent Saginaw had submitted (R. 17631-17704). The hearing board, after reviewing these contentions and stating its understanding of them, conducted 14 days of hearings on the statement, in which respondent Saginaw failed to participate. When called on to suggest findings of fact at the conclusion of the hearings, Saginaw had "no conventional findings of fact to set forth" (App. 256),

making it, as the Licensing Board noted, "virtually impossible in some instances to know whether particular issues are in fact contested" (App. 190 n. 10). As the Appeal Board and the Commission observed, "[p]articipation in this manner * * * subverts the entire adjudicatory process" (App. 257, 342).

Wholly apart from the question whether energy conservation should have been one of the many subjects considered in the environmental analysis is the more fundamental issue whether this single alleged lapse occurring in a long and complex process with extraordinary scope for public participation and comment warrants reversal, as the court here found. Nothing in NEPA requires so active a judicial role in this context.

While NEPA does establish important substantive policies for the federal government and the nation in Section 101 (42 U.S.C. 4331), its mandate to federal agencies in Section 102 (42 U.S.C. 4332) is essentially procedural.[47] The basic purpose of Section 102 is to reform agency decision making *processes* so that environmental values are properly considered along with other important factors as an integral part of the decision making process. Section 102(2) has been characterized as an "action forcing" provision, de-

---

[47] *Aberdeen & Rockfish R. Co.* v. *Students Challenging Regulatory Agency Procedures (SCRAP II)*, 422 U.S. 289, 319; *Lathan* v. *Brinegar*, 506 F.2d 677, 689 (C.A. 9); *National Helium Corp.* v. *Morton*, 486 F.2d 995, 1001 (C.A. 10); *Environmental Defense Fund, Inc.* v. *Tennessee Valley Authority*, 468 F.2d 1164, 1176 (C.A. 6); *Calvert Cliffs' Coordinating Committee, Inc.* v. *Atomic Energy Commission*, 449 F.2d 1109, 1112 (C.A. D.C.).

BLEED THROUGH POOR COPY

signed to assure that this purpose is in fact achieved. 115 Cong. Rec. 40416 (1969); S. Rep. No. 91-296, 91st Cong., 1st Sess. 9 (1969); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 409 n. 18. Thus, Section 102(2)(A) and (B) (42 U.S.C. 4332(2)(A) and (B)) require agencies to "utilize a systematic * * * approach which will insure the integrated use of * * * [environmental knowledge] in planning and in decisionmaking" and "identify and develop methods and procedures * * * which will insure that * * * [environmental values] may be given appropriate consideration in decisionmaking along with economic and technical considerations". The intent was to mesh environmental concerns with more traditional regulatory patterns. *Aberdeen and Rockfish R. Co.* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP I*), 409 U.S. 1207, 1218 (Burger, C.J., denying application for a stay).

The impact statement requirement of Section 102 (2)(C) (42 U.S.C. 4332(2)(C)) is a further action forcing provision. It is a "discrete procedural obligation on Government agencies to give written consideration of environmental issues," *Aberdeen & Rockfish R. Co.* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP II*), 422 U.S. 289, 319, in order to provide evidence that the required consideration has in fact been made. *Calvert Cliffs' Coordinating Committee, Inc.* v. *Atomic Energy Commission*, 449 F.2d 1109, 1114 (C.A. D.C.).

Once the impact statement required by Section 102 (2)(C) has been prepared, the role of a court re-

viewing the sufficiency of an agency's consideration of environmental factors is limited.

> Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions. * * * The only role for a court is to insure that the agency has taken a "hard look" at environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."

Kleppe v. *Sierra Club*, *supra*, 427 U.S. at 410 n. 21, quoting with approval *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F. 2d 827, 838 (C.A. D.C.).

Moreover, (*Natural Resources Defense Council, Inc.* v. *Morton*, *supra*, 458 F. 2d at 838 (footnote omitted)),

> [s]o long as * * * agencies have taken the "hard look" at environmental consequences mandated by Congress, the court does not seek to impose unreasonable extremes * * *.

See, also, *New York* v. *Kleppe*, 429 U.S. 1307, 1311 (Marshall, J., denying application to vacate stay).

Accordingly, the public nature of the environmental review process and the many opportunities which exist for correcting substantive oversight before the agency tend to assure achievement of the Act's purposes. Obviously, failure to produce a required statement may require judicial intervention,[18] as indeed

BLEED THROUGH POOR COPY

may an improperly unresponsive public process or a significantly deficient analysis. But the single alleged shortcoming on a peripheral issue, urged on the court here by a party that refused to cooperate with the agency's efforts, is an inappropriate basis for reversal. See *Ogunquit Village Corp.* v. *Davis*, C.A. 1, No. 76-1425, decided April 20, 1977; *Sierra Club* v. *Morton*, 510 F.2d 813, 826 (C.A. 5); *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 492 F.2d 1123, 1135-1136 (C.A. 5); *Natural Resources Defense Council, Inc.* v. *Tennessee Valley Authority*, 367 F. Supp. 128, 131 (E.D. Tenn.). Even in a criminal case, the defendant is entitled only to a fair trial, not a perfect one. *Lutwak* v. *United States*, 344 U.S. 604, 619; *Bruton* v. *United States*, 391 U.S. 123, 135; *Schneble* v. *Florida*, 405 U.S. 427, 432.

A. The Commission Had No Independent Obligation In 1972 To Consider Whether Energy Conservation Might Affect The Need For The Proposed Plant.

Under the Atomic Energy Act of 1954, questions of the need for power to be supplied by a proposed facility are reserved to state public utility com-

---

[48] See, *e.g.*, *Hart* v. *Denver Urban Renewal Authority*, 551 F.2d 1178 (C.A. 10); *Swain* v. *Brinegar*, 542 F.2d 364 (C.A. 7); *Cady* v. *Morton*, 527 F.2d 786 (C.A. 9); *Jones* v. *Lynn*, 477 F.2d 885 (C.A. 1); *Environmental Defense Fund, Inc.* v. *Froehlke*, 473 F.2d 346 (C.A. 8); *Wyoming Outdoor Coordinating Council* v. *Butz*, 484 F.2d 1244 (C.A. 10); *Ely* v. *Velde*, 451 F.2d 1130 (C.A. 4).

missions and like bodies (42 U.S.C. 2021(k)). Prior to the passage of NEPA, the Commission did not consider this issue; it has done so in conjunction with its NEPA analyses since the court of appeals' decision in *Calvert Cliffs'*, *supra*, but whether it could lawfully decline to issue a license on the ground that the power from the plant was not needed, despite a state public utility commission conclusion to the contrary, has never been judicially determined. Cf. *Public Service Co. of New Hampshire*, 5 N.R.C. 503, March 31, 1977 (Seabrook Station, Units 1 and 2). The environmental impact statement for the Midland facility considered the need for the power to be produced, but that issue was—and remains—outside the Commission's central responsibility for public health and safety.

One possible sub-issue, or alternative, to be considered in connection with the need for power is whether conservation measures could obviate the need for the power to be generated by the proposed facility. The Commission has no authority to impose or enforce such conservation measures, but it might be argued that if it refused to license a facility because it would be unnecessary if energy were effectively conserved, that would lead local authorities to require conservation. The Commission did not specifically consider the possibility of conservation as an alternative to the production of more power, and it was this failure which the court of appeals found "capricious and arbitrary," requiring new hearings on

BLEED THROUGH POOR COPY

the construction permit that had been issued (App. 104).[49]

As with the choice-of-procedures question discussed above, pp. 38-51, *supra*, this issue is one which ought to have been decided, not on the basis of judicial hindsight, but from the perspective of the first half of 1972, when the statement under challenge was being prepared and reviewed. The Commission recognized in its January 1974 opinion (App. 324, 344) that "[a]s we gain experience on a case-by-case basis and hopefully, feasible energy conservation techniques emerge, the applicant, staff, and licensing boards will have obligations to develop an adequate record on these issues in appropriate cases, whether or not they are raised by intervenors." In fact, current Commission practice is to require consideration of such issues in each case (10 C.F.R. 51.23(d)), but that does not mean it was required to do so in 1972.

---

[49] In contrast, the D.C. Circuit had recognized in *Natural Resources Defense Council, Inc.* v. *Morton*, *supra*, 485 F.2d at 837-838:

> There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies—making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.

Indeed, the opinion below makes plain the court of appeals' use of later perspectives, particularly in its extensive reliance on an April 1976 report.[50] It would be hard to conclude that in 1972 there appeared to be a reasonable likelihood that the demand for the energy to be produced by the plant could be met by the use of effective techniques for conserving energy. This was before the Arab oil embargo, fuel shortages, rising energy prices, and the concomitant sense of national crisis had focused substantial research efforts and public attention on the need and particular methods for conserving energy.[51] Particularly significant in assessing the reasonableness of the Commission's action in 1972 is the absence from the 1971 federal guidelines for the preparation of environmental impact statements of any suggestion that energy conservation should be considered as an alternative (36 Fed. Reg. 7725). Not until the Council on En-

---

[50] App. 102 and n. 15.

[51] The Arab oil embargo of October 1973 brought a dramatic increase in the price of oil. While the price of world oil had risen only 11 cents per barrel in 1972 and had been stable for decades (between 1947 and 1970 the price of oil decreased in terms of constant dollars), from October 1, 1973 to January 1974 prices rose from $3.01 a barrel to $11.65 a barrel. Congressional Quarterly, *Continuing Energy Crisis in America* 14 (1975). See also Foster Associates, Inc., *Energy Prices 1960-1973—A Report to the Energy Policy Project of the Ford Foundation* 37-39 (1974). The embargo acted as a spur toward study of energy conservation as an important constituent of the nation's energy policy. See, generally, Ford Foundation, *A Time to Choose: America's Energy Future* (1974); Federal Energy Administration, *Project Independence* (1974).

BLEED THROUGH POOR COPY

vironmental Quality (CEQ) amended the guidelines on August 1, 1973, more than a year after the close of the record in the Midland case, did the federal guidelines even arguably call for consideration of energy conservation in an environmental impact statement.[52] That amendment, by its terms, was to become effective January 28, 1974, more than one and one-half years after the Midland record closed (38 Fed. Reg. 20550, 21265).[53]

The court of appeals' use of judicial hindsight in this case threatens to make finality in the lengthy and complex agency proceedings in this field almost impossible to achieve, particularly in view of rapidly developing energy technologies and perspectives. As this Court has repeatedly emphasized (*Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503,

---

[52] See 40 C.F.R. 1500.8(a)(4); CEQ Memorandum for Heads of Agencies (August 2, 1973) and attachment. Even then the agency was simply to consider "alternatives related to different designs or details of the proposed action which would present different environmental impacts (*e.g.*, cooling ponds vs. cooling towers for a power plant or alternatives that will significantly conserve energy)." 40 C.F.R. 1500.8(a)(4). In context, what is called for is that the agency consider whether more energy-efficient facilities could be constructed (CEQ Memorandum, *supra*, Att. A at 2, para. 6), not whether, as Saginaw contends, the public consumption of energy could be reduced so that the power to be produced by the plant would not be needed.

[53] The Commission's recognition, in its *Niagara* decision, of the desirability of treating energy conservation issues for the future was contemporaneous with the CEQ guideline and the FPC procedures relied on by the court (App. 102).

514; *United States* v. *Interstate Commerce Commission*, 396 U.S. 491, 521):

> Administrative consideration of evidence * * * always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.

This case presents a nearly classic example of that problem. Commission proceedings for the issuance of a construction permit for a nuclear plant take years —the instant one took nearly four [54]—and involve highly complex, technical reviews that are strongly dependent on the state of the technological art. Appeal Board, Commission, and judicial review of Licensing Board decisions may consume additional years—nearly another four in this case.[55]

---

[54] Consumers' application for a construction permit was filed in January 1969. App. 185. The Licensing Board's initial decision and order directing the issuance of a construction permit was dated in December 1972. App. 222.

[55] The court below issued its decision in July 1976, more than three and one half years after the construction permit issued.

BLEED THROUGH POOR COPY

As with the procedural question discussed in point I, *supra*, the court of appeals' approach here would tend to disrupt, rather than enhance, achievement of the statutory objectives. There, it would force agencies to use excessive and possibly stultifying procedures in conducting rule-making proceedings. Here, it would create similar problems for agencies in preparing environmental impact statements. If the courts of appeals stand ready to reverse an extensively considered agency action because of a single alleged shortcoming on a peripheral issue in a complex environmental analysis, the level of attention to detail must increase, not diminish.[56]

B. Intervenors Did Not Adequately Present Energy Conservation Issues.

The court of appeals concluded that (App. 100-101; footnote omitted):

> an intervenor's comments on a draft EIS raising a colorable alternative not presently considered therein must only bring "sufficient attention to the issue to stimulate the Commission's consideration of it." Thereafter, it is incumbent on the Commission to undertake its own preliminary investigation of the proffered alternative suffi-

---

[56] Cf. Executive Order 11991, 42 Fed. Reg. 26967, which directs the CEQ to "[i]ssue regulations to Federal agencies * * * to reduce paperwork and the accumulation of extraneous background data [in the preparation of environmental impact statements], in order to emphasize the need to focus on real environmental issues and alternatives * * * [and to] require impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses."

> cient to reach a rational judgment whether it is worthy of detailed consideration in the EIS.

The Commission, on the other hand, phrased the intervenor's responsibility as follows (App. 344 and n. 27):

> [A]t this emergent stage of energy conservation principles, intervenors * * * must state clear and reasonably specific energy conservation contentions in a timely fashion. Beyond that, they have a burden of coming forward with some affirmative showing if they wish to have these novel contentions explored further.[27]

---

[27] We do not equate this burden with the civil litigation concept of a *prima facie* case, an unduly heavy burden in this setting. But the showing should be sufficient to require reasonable minds to inquire further. * * *

In practical effect, this difference in approach led the court to conclude that Saginaw had sufficiently raised energy conservation issues to require further examination by the Commission. The court pointed to four examples in Saginaw's 119 contentions as showing how Saginaw had "forcefully pointed out" the need for energy conservation (App. 93-94 and n. 6).[57] The contention the court identified as raising

---

[57] As the Commission noted (App. 333-334), although Saginaw ultimately identified 17 of its 119 contentions as bearing on energy conservation, "its original submission to the Board did not point up any such common theme." For example, although the court below faulted the Commission for "conflating" intervenors' arguments relating to energy conservation

BLEED THROUGH POOR COPY

the question whether modifications in the rate structure would encourage the conservation of energy states (App. 1367-1368):[58]

> Applicant and the Michigan Public Service Commission have illegally created an incentive for continual construction of generating facilities when they are unnecessary. The rate structure imposed upon Applicant by the Michigan Public Service Commission encourages Applicant to create unwarranted costs upon the environment. Because Applicant's ability to receive a fair return on its invested capital is directly related to outstanding amounts of unamortized construction and other capital costs, Applicant has an incentive to continue to construct power facilities, whether necessary or not, in order to maintain an artifically high rate structure. Specifically, Intervenors contend that Applicant is failing to use existing generating facilities to the extent of their useful lives and it is taking such facilities out of base load or peaking service after such facilities have been amortized and removed from consideration of Applicant's rate structure. Thus, the proposed plant represents an attempt to construct a facility in order to maintain an artifi-

---

and those challenging the social utility of the ways in which Consumers' customers planned to use the electricity (App. 95-96 n. 8), any apparent confusion is due to the fact that the Commission was responding to Saginaw's arguments as they were presented.

[58] The court below incorrectly identifies this as paragraph 48; it is in fact paragraph 49.

> cally high rate structure and, as such, it represents an unwarranted cost to the environment.[59]

The Commission, while noting that the thrust of Saginaw's rate structure argument is that current rates tend to encourage construction of unneeded plants rather than that they encourage high-volume use of electricity, emphasized that the Board had recognized the relevance of such arguments in the licensing proceeding (App. 336-337, 341). But, it concluded, Saginaw had failed to support these claims with any elaboration requiring further exploration by the Board (App. 344). In sum, the Board was entitled to rely on the substantial evidence of record in finding as a fact that the postulated demand was reasonable and reflected normal industrial and residential uses (App. 334-335).[60]

---

[59] In addition, in paragraph 88 (App. 1384), after challenging the projections of energy use by major industrial consumers of power, Saginaw states:

> Concomitantly, Applicant has failed to factor into its projection the possibility that rate structures will be revised so as to make large use of electricity on a per unit basis more expensive thereby discouraging the increased use of electricity.

[60] The treatment of the other 16 contentions ultimately identified by Saginaw as relating to energy conservation was similar. The court of appeals identified (App. 93-94 and n. 6) three other paragraphs as "forcefully" raising energy conservation issues: Paragraph 47, relating to promotional advertising (App. 1366-1367), paragraph 87 relating to air conditioner usage (App. 1383-1384), and paragraph 85, relating to a generalized need for "conservation of energy re-

BLEED THROUGH POOR COPY

The Commission's approach was entirely reasonable. It simply required intervenors to formulate their objections with at least minimal specificity, and to indicate more precisely the ways in which their suggestions might lead to a reduced need for power. For example, as the Commission noted, the intervenors in *Niagara* had been sufficiently specific to require the Board in that case to consider the applicant's rate structure by suggesting "[c]hanges in the rate structure for electricity designed to decrease demand—such as modification of volume discounts, or raising prices during peak demand periods" (App. 329).

The court of appeals incorrectly concluded (App. 100) that the Commission had placed on the intervenors the entire burden of compiling information bearing on whether the proposed alternative is promising enough to merit detailed consideration in the impact statement, and had required intervenors to prove that the proposed alternative satisfied the rule of reason before the Commission would investigate it. Instead, the Commission has required only that an intervenor indicate with some specificity that his suggested alternative would affect the cost-benefit analysis—and thus alert the Commission that further

---

sources" (App. 1383). The Licensing Board invited intervenors to present some evidence in support of each of these contentions, but in the absence of any specific suggestions of ways in which projected demand might be effectively reduced, the Commission relied on the record evidence indicating that the applicant's demand projections were reasonable (App. 334-339).

inquiry is reasonable. The test is, in fact, very similar to the one approved by the D.C. Circuit in considering an agency's responsibility to investigate comments on proposed rule making:

> [C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made [in the agency's reasoning]; it must show why the mistake was of possible significance in the results * * *.

Portland Cement Association v. *Ruckelshaus*, 486 F. 2d 375, 394 (C.A. D.C.), certiorari denied *sub nom. Portland Cement Corp.* v. *Administrator, Environmental Protection Agency*, 417 U.S. 921.

Accordingly, it was error for the court of appeals to reverse the Commission on this record, even if the Commission should have considered energy conservation issues more extensively had they been brought properly to its attention.

III. THE ACRS REPORT SHOULD NOT HAVE BEEN RETURNED TO THE ACRS FOR SUPPLEMENTATION.

The court of appeals also erred in remanding the Advisory Committee on Reactor Safeguards report to the Committee for clarification of the reference to "other problems related to large water reactors * * * identified by the Regulatory Staff and the ACRS and cited in previous ACRS reports" (App. 105, 108).

BLEED THROUGH POOR COPY

In so doing, it created a remedy no party had sought before the Commission or the court, one which was not available under Commission practice and which is inconsistent with the statute and with existing demands on the Advisory Committee's limited resources.

Ensuring that nuclear reactors are safe enough to permit their operation without endangering the health and safety of the public is a major function of the Commission. See, *e.g.*, 42 U.S.C. (Supp. V) 5841 (f), 5843(b). That this is a highly technical job needs no elaboration.

The Commission has long recognized the need for independent expert technical advice to supplement its own understanding and the work of its staff. Thus, it established an independent Reactor Safeguards Committee in 1947, through exercise of its administrative authority. The Committee, then as now, consisted of 15 outstanding experts from a variety of disciplines, who are primarily employed by other institutions and spend only about one-third of their professional time with the Committee. They bring to the Committee, and thus to the Commission, an independent perspective on nuclear problems and an unusually high level of professional achievement. Their reports were originally provided in confidence in the belief that this would promote objectivity, but the Committee nonetheless came to enjoy great prestige.

In 1957 Congress made the Committee a statutory body, 71 Stat. 576, and in the course of doing so required that a Committee report be received prior to the licensing, *inter alia*, of any nuclear power facility for construction and that this report be made public. 42 U.S.C. 2232(b). The character of the Committee, however, remained unchanged. Nothing in either the statute or its legislative history indicates that, by making the Committee's reports public, Congress intended to make significant changes in the demands on the Committee's time. The legislative history indicates that Congress recognized the great prestige that the Committee already enjoyed, and simply wished to make the results of its deliberations, as they stood, known to the public.[61]

The primary function of the ACRS reports on individual nuclear reactors proposed for licensing is to

---

[61] See S. Rep. No. 296, 85th Cong., 1st Sess. 24 (1957):

> One of the main reasons for the sources [sic] of the Commission's reactor safety activities in the past has been the close scrutiny of the AEC-built reactors and great prestige of its present Reactor Safeguards Committee. The Joint Committee [on Atomic Energy] desired this same type of scrutiny and prestige to be maintained with respect to privately built power and testing reactors.

Accord, A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities, Joint Committee Print, 85th Cong., 1st Sess. 32-34 (1957) (hereafter "A Study of AEC Procedures").

BLEED THROUGH POOR COPY

communicate the Committee's views on highly technical matters to the Commission's technical staff."[62] Since the Committee works at the direction of the Commission, the Commission has adequate power to return an ACRS report to the Committee for elaboration if the Commission's staff finds it unclear. It has done so in the past from time to time,[63] and will continue to do so whenever the need arises. But since the Committee is designed to serve solely as an advisory committee to the Commission, the only function of judicial review is to assure that the ACRS has reviewed the application in question and that its report has been made public and entered into the record for the facility as the statute requires (42 U.S.C. 2232(b)).

The court below discerned a separate, judicially enforcible duty of the ACRS to state its views to the public. It relied on language in the legislative history indicating that the ACRS report "is to be made public so that all concerned may be apprised of the safety

---

[62] The Section of the Atomic Energy Act establishing the ACRS states that (42 U.S.C. 2039):

> The Committee shall review safety studies and facility license applications referred to it and shall make reports thereon, shall advise the Commission with regard to the hazards of proposed or existing facilities and the adequacy of proposed reactor safety standards, and shall perform such other duties as the Commission may request. * * *

See S. Rep. No. 296, 85th Cong., 1st Sess. 24 (1957); A Study of AEC Procedures, *supra* note 60, at 32-33 (1957).

[63] See, *e.g.*, letter of February 12, 1975, from NRC Chairman Anders to William Kerr, Chairman, ACRS.

or possible hazards of the facility," and on the Joint Committee's view that "when the public is adequately and accurately informed * * * it will be in a better position to accept the construction" of nuclear reactors (S. Rep. No. 296, 85th Cong., 1st Sess. 24 (1957); App. 107-109).

The court admitted that "the reference [in the ACRS report here] to 'other problems' identified in previous ACRS reports may have been adequate to give the Commission the benefit of the ACRS members' technical expertise" (App. 107-108). Nevertheless, it held (App. 108) that the Licensing Board should *sua sponte* have returned the report to the ACRS for

> a short explanation, understandable to the layman, of the additional matters of concern to the committee, and a cross-reference to the previous reports in which those problems, and the measures proposed to solve them, were developed in more detail.

The imposition of such a requirement on an advisory body of limited resources, enforced years after the fact by judicial oversight, is most extraordinary. It should not be undertaken in the absence of a clear indication that Congress intended such a result. It is particularly inappropriate here, where a likely alternative explanation for the "public report" provision is manifest. As the court of appeals itself recognizes (App. 107), the "public report" requirement was designed to avoid the possibility that the Commission might license a facility despite an adverse ACRS report that was concealed from the public.

BLEED THROUGH POOR COPY

See *Union of Concerned Scientists* v. *Atomic Energy Commission*, 499 F. 2d 1069, 1073 n. 5, 1075 n. 15 (C.A. D.C.). The purpose of requiring publication of the report was thus to make the position of the ACRS a matter of public record, rather than to permit public evaluation of the basis for the ACRS position.[64] The publication of the ACRS report on the Midland reactors satisfied that purpose, and thus it complied with the statute.

In any event, there was no need to supplement the report here. The report explained that the "other problems related to large water reactors" of concern to the ACRS were those "cited in previous ACRS reports" (App. 105).[65] These problems were further identified by the ACRS in a list prepared shortly after the Licensing Board's initial decision, which identified the Committee's generic safety concerns. The Committee explained that this list identified the "other problems" mentioned in the Midland report and in ACRS reports on other individual facilities. (R. 24389-24395). The list noted those problems the ACRS considered resolved on a generic basis and described the solution or listed the titles of documents setting forth the solution. The list also identified those problems which would require case-by-case consideration until a generic resolution was achieved.

---

[64] Information bearing on that evaluation is available to the public in ample detail in the staff safety evaluation report (see *supra*, pp. 6-8).

[65] All ACRS reports are available to the public in the Commission's Public Document Room.

Respondents introduced the list into the record of this proceeding (R. 24385-24388).[66] Thus, any lack of specificity in the reference in the Midland report to "other problems" was cured by the latter report.

Even if it is assumed, *arguendo* that the ACRS report was not sufficiently detailed, directing that the report be returned to the ACRS was an inappropriate remedy. The Committee is limited by statute to fifteen members, who because of their exceptional training and abilities are particularly capable of providing vital advice to the Commission. Since they are employed by other institutions, the time they can devote to Committee business is strictly limited. In these circumstances, the courts should be reluctant to divert the Committee from its primary function by imposing additional duties on it.

But the court below concluded, without discussion, that the Licensing Board should have returned the report "*sua sponte* to ACRS for further elaboration" (App. 108). It thus directed an intrusion on the Committee's time that was inappropriate, a remedy not provided for in the Commission procedures, not sought before the Commission, and not argued to the court. In this case, the Committee's subsequent generic letter also made it, as a matter of fact, unnecessary. Beyond this, the court's conclusion that the Licensing Board should have returned the report to the ACRS misconceives the function of the Committee, which is designed to provide the Commission with

---

[66] The list is also available in the Commission's Public Document Room.

BLEED THROUGH POOR COPY

technical advice on a variety of matters. 42 U.S.C. 2039. It is thus for the Commission, not an individual Licensing Board, to determine the matters that are important enough, in relation to the other work of the Committee, to warrant its attention.

The remedy created here, like the court's approach on the procedural and NEPA issues, would generate substantial pressure for over-elaborate systems or responses in order to avoid the possibility of future reversals. Many Committee reports contain similar references to other problems, making the potential precedential effect of the decision below serious. To date, the Committee has been free from the pressures of litigation—as in the balance of its opinion the court recognized was properly the case. The remedy ordered here, however, would have the ultimate effect of subjecting the Committee to just such pressures.[67]

[67] If the court had simply required the Committee to identify the other reports in which the problems were described, the pressure would have been less severe. But the court required in addition "a short explanation, understandable to a layman" of each problem so identified (Pet. No. 76-528, App. 20).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals in No. 76-419 should be reversed, and the judgment in No. 76-528 should be reversed insofar as it remands the orders granting construction permits for the Midland reactors to the Commission for further proceedings.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

ANTHONY C. LIOTTA,
Acting Assistant Attorney General.

HARRIET S. SHAPIRO,
Assistant to the Solicitor General.

EDMUND B. CLARK,
JOHN J. ZIMMERMAN,
Attorneys.

PETER L. STRAUSS,
General Counsel,

STEPHEN F. EILPERIN,
Solicitor,

E. LEO SLAGGIE,
RICHARD S. MALLORY,
Attorneys,
Nuclear Regulatory Commission.

JUNE 1977.

☆ U. S. GOVERNMENT PRINTING OFFICE, 1977 237290 19

BLEED THROUGH POOR COPY